

(4)

No. 93-1631

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**In the Supreme Court of the United States**  
OCTOBER TERM, 1994

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**LLOYD BENTSEN, SECRETARY OF THE TREASURY,**  
**PETITIONER**

v.

**COORS BREWING COMPANY**

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**JOINT APPENDIX**

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**PETITION FOR WRIT OF CERTIORARI FILED**  
**APRIL 15, 1994**  
**CERTIORARI GRANTED JUNE 13, 1994**

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### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

87-Z-977

ADOLPH COORS COMPANY

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE UNITED STATES DEPT. OF TREASURY, STEVE HIGGINS,  
IN HIS OFFICIAL CAPACITY AS DIRECTOR BATB

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE  
U.S. HOUSE OF REPRESENTATIVES,  
DEFENDANT IN INTERVENTION

### DOCKET ENTRIES

DATE	PROCEEDINGS
1987	
7/2	COMPLAINT . . pd Summons Issued
7/14	Return of Service of S&C to Linda Blan, recep- tionist for U.S. Atty on 7/9/87
7/22	MOTION for Extension of Time by defts to 9/8/87 to answer or plead to complaint . . . com
7/28	MINUTE ORDER (ZLW) . . . def granted to 9/8/87 to respond . . . COM . . eod 7/29/87
9/2	MOTION for Enlargement of Time (to answer or otherwise respond to complaint to 10/8/87) . . . by defts . . . cos

(1)

DATE	PROCEEDINGS
<b>1987</b>	
9/3	Notice of Substitution of Counsel (Nancy E. Rice for James R. Cage) . . . by Defts com
9/17	MINUTE ORDER (ZLW) . . . deft's motion for enlargement of time to answer or respond to pltf's complaint is GRANTED to 10/8/87 . . . com . . . eod 9/18/87
10/13	RESPONSE to defts' motion to stay . . by pltf . . com
10/22	ANSWER by defts Baker and Higgins . . . cos MOTION for Stay by defts . . . cos
11/3	MINUTE ORDER (ZLW) . . . defts' motion for stay is GRANTED to 11/23/87 . . . com . . . eod 11/4/87
<b>1988</b>	
1/8	MOTION of Speaker and Bipartisan Leadership Group of the U.S. House of Representatives to Intervene . . . cos  Memorandum of Points and Authorities in Support of the Motion of the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives to Intervene by pltf.
1/15	Notice of Substitution of Counsel by Daniel S. Maus for Nancy Rice . . . com
2/4	Response of Plaintiff to the Motion to Intervene by the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives . . . com
6/17	Notice of substitution by William Pharo for Daniel Maus . . by deft, USA . . com
7/28	MINUTE ORDER (ZLW) . . . the court will consider the motion of Speaker and Bipartisan Leadership Group of The U.S. House of Representa-

DATE	PROCEEDINGS
<b>1988</b>	
	tives to Intervene when movant has complied with FRCP 24(c) . . . since deft's motion to stay expired 11/23/87, case shall either proceed to trial or counsel move to continue stay . . . com . . . eod 7/28/88
8/15	Letter to Steven R. Ross from Thomas J. Carney re: if nothing is heard from Mr. Ross by 9/1/88, it will be assumed that there is no desire to pursue matter
8/18	copy of Letter to Mr. Carney from Steven R. Ross re: propose to file papers responsive to Court's order by 9/26/88
9/26	ANSWER of Intervenor-Defendants Speaker and Bipartisan Group of the U.S. House of Representatives . . . cos
9/29	ORDER (ZLW) . . . the motion to intervene is GRANTED . . . com . . . eod 9/30/88
10/13	Amended certificate of mailin[g] Order entered 9/29/88.
10/18	ORDER OF REFERENCE (ZLW) . . . to magistrate Abram to conduct discovery and pretrial matters . . . com . . . eod 10/21/88
10/20	ORDER (DEA) . . . scheduling conf set 11/15/88 at 8:00 . . . com . . . eod 10/21/88
11-15	MINUTE ORDER (DEA) that motions for summary judgment due 2-28-89 . . . Discovery to be completed by 1-31-89 . . . Answer briefs to any motions for summary judgment due 3-31-89 & replies by 4-14-89 . . . com . . . eod 11-16-88

DATE	PROCEEDINGS
<b>1988</b>	
12/7	Answers and Objections of Intervenor-Defendants to Plaintiff's Firss [sic] Set of Interrogatories and Response to Request for Production . . . co [sic] s
<b>1989</b>	
2/28	MOTION of Speaker and Bipartisan Leadership Group of U.S. House of Representatives for Summary Judgment . . . cos Memorandum of Points and Authorities in Support of the House's Motion for Summary Judgment Upholding the Statute . . . cos Motion for Leave to Appear Through Counsel for the U.S. House of Representatives and Without Appointment of Local Counsel of Steven R. Ross, Charles Tiefer and Janina
3/2	MOTION of Plaintiff for Summary Judgment, Brief in Support of Motion, Exhibits, Certificate of Mailing
3/9	MINUTE ORDER (ZLW) . . . that intervenor-defts' motion for leave to appear through counsel for US House of Representatives and W/O Appointment of local counsel is GRANTED . . . court reserves right to require appearance of local counsel . . . com . . . eod 3/10/89
3/10	ORDER (DEA) . . . counsel for plt shall report to Magistrate by 3/22/89 re status as to written discovery . . . com . . . eod 3/10/89

DATE	PROCEEDINGS
<b>1989</b>	
3/24	MOTION of Plaintiff for Extension of Time to file its answer brief to deft's motion for summary judgment to 4/10/89 . . . com
3/27	MINUTE ORDER (ZLW) . . . plf motion for extension to file answer brief to motion for summary judgment GRANTED to 4/10/89 . . COM . . eod 3/28/89
3/30	Opposition of House to Plaintiff Coors' Cross-Motion for Summary Judgment . . . cos Response of House Intervenor-Defendant to Plaintiff's Motion for Extension of Time . . . cos
4/5	Letter from Janina Jaruzelski re: attached copy of public hearing on Misbranding Regulations cited in House Intervenor's Summary Judgment brief
4/11	Letter from Linda Gavit re: attached documents for Court to take judicial notice of (hearings before Federal Alcohol Control Admin on 11/1/84 and Dept of Treasury draft bill to amend Federal Alcohol Admin Act dated 4/14/89)
4/12	Response of Plaintiffs to the House's Motion for Summary Judgment by The Speaker and Bipartisan Leadership Group . . . com
4/14	MINUTE ORDER (ZLW) . . . that cross motions for summary judgment are set for hearing on 5/31/89 at 8:30 . . . com . . . eod 4/17/89
4/17	Objection of Plaintiff to House Intervenor-Defendant's Motion for Extension of Time to File Reply Brief . . . com



DATE	PROCEEDINGS
1989	
4/18	MINUTE ORDER (ZLW) . . . intervening-deft may have until 5/5/89 to file reply brief . . . that before appearing in this court on 5/31/89, counsel for intervening deft shall be familiar with all applicable local rules . . . com . . . eod 4/18/89
5/5	Reply of House Intervenor-Defendants to Plaintiff's Responses to House's Motion for Summary Judgment . . . cos
5/26	MOTION of G. Heileman Brewing Company, Inc. for Leave of the Court to File Amicus Curiae Brief . . . cos TENDERED Memorandum of G. Heileman Brewing Company, Inc.
5/31	HEARING (ZLW) . . . ORDERED: court declares and adjudged that the statutes, 27 USC §205(e)(2) and §205(f)(2) are unconstitutional only to extent that they prohibit disclosure of alcoholic content of malt beverages . . . the Bureau of Alcohol, Tobacco and Firearms shall not enforce said provisions . . . pltf's motion for summary judgment filed 3/2/89 is GRANTED . . . the motion of Speaker and Bipartisan Leadership Group of US House of Representatives for summary judgment filed 2/2/89 is DENIED . . . eod 6/1/89 ORDER (ZLW) . . . the motion of Speaker and Bipartisan Leadership Group of The U.S. House of Representatives for Summary Judgment is DENIED . . . pltf's motion for summary judgment is GRANTED . . . court declares, adjudges

DATE	PROCEEDINGS
1989	
	and decrees that those specific parts of 27 USC §§205 (e)(2) and (f)(2), prohibiting statements of the alcoholic content of malt beverages are unconstitutional restraints on commercial speech in violation of the First Amendment of the Constitution of the US . . . the Bureau of Alcohol, Tobacco and Firearms shall not enforce said statutory prohibition . . . com . . . eod 6/2/89
6/2	Reporter's Transcript of hearing on Cross-Motions for Summary Judgment before Judge Weinshienk on 5/31/89 (pages 1-61)
6/30	NOTICE OF APPEAL, filed by Intervenor Defts Speaker and Bipartisan Leadership Group of the U.S. House of Representatives in re: final judgment of 5/31/89 cos. Notice of Transcript Order form due 7/10/89. Notice mailed to all counsel 6/30/89 (U.S.A.)
7/7	Notice of Transcript Order form filed by Intervenor Defts/Appellants (Transcript necessary is already on file)
7/13	Case No. 89-1203 assigned by the Court of Appeals
7/26	NOTICE OF APPEAL, filed by Defts. James Baker and Steven Higgins in re: final judgment of 5/31/89 . . . cos Notice of Transcript Order form due 8/7/89. Notice mailed to all counsel 7/27/89 (U.S.A.)
8/3	Case No. 89-1239 assigned by the Court of Appeals
8/7	Notice of Transcript Order form filed by Deft/Appellants Baker & Higgins (Transcript necessary is already on file)



DATE	PROCEEDINGS
<b>1990</b>	
2/14	Letter from the Court of Appeals advising that Court has entered an order requiring the transmission of the record on appeal in 89-1203 and 89-1239 by 2/23/90. Designation attached.
2/21	Record on Appeal, consisting of Volumes I and II, transmitted to the Court of Appeals
<b>1991</b>	
11/8	MANDATE from the Court of Appeals (89-1203 and 89-1239) (Issued 11/8/91) JUDGMENT dated (9/23/91) Judgment of the District Court is REVERSED. Cause is REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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87-CV-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE UNITED STATES DEPARTMENT OF TREASURY,

DEFENDANT

STEVE HIGGINS,

IN HIS OFFICIAL CAPACITY AS DIRECTOR BATB, DEFENDANT

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE  
U.S. HOUSE OF REPRESENTATIVES,  
INTERVENOR-DEFENDANT

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DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
11/8/91	—	MANDATE from the Court of Appeals; CA # 89-1203 & 89-1239; Dt issued 11/8/91; Judgement dated (9/23/92) Judgment of the District Court is reversed. Cause is remanded for further proceedings consisted with this opinion. (lf) [Entry date 12/18/91]
12/6/91	1	MINUTE ORDER: by Judge Zita L. Weinshienk case is reopened on the docket of this court; Case referred to Magistrate Judge Donald E. Abram to conduct further discovery (cc: all counsel); entry date: 12/18/91 (lf) [Entry date 12/18/91]

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12/16/91	2	MINUTE ORDER: by Magistrate Judge Donald E. Abrams; discovery Conf 8:30 12/27/91 (cc: all counsel); entry date: 12/18/91 (lf) [Entry date 12/18/91]
12/31/91	3	MINUTE ORDER: by Magistrate Judge Donald E. Abrams; Mag Conf 8:30 12/27/91 held, ; (Further discovery conf) Mag Conf is scheduled 11:45 am on 1/16/92 (cc: all counsel); entry date; 1/2/92 (pa) [Entry date 01/02/92]
1/10/92	4	NOTICE OF APPEARANCE for defendant James Baker, defendant Steve Higgins by Patricia M. Russotto (yk)
1/14/92	5	MINUTE ORDER: by Judge Zita L. Weinshienk. Defts' notice of appearance [4-1] will be treated as a motion for substitution of counsel and is granted. Patricia M. Russotto is substituted for Thomas Millet as counsel for defts. (cc: all counsel); entry date: 1/15/92 (gc) [Entry date 01/15/92]
1/17/92	6	MINUTE ORDER: by Magistrate Judge Donald E. Abram; rule 16 conference set 11:45 on 2/14/92; Mag Conf held 11:45 on 1/16/92; parties to exchange list of witnesses and depositions by 2/7/92. (cc: all counsel); entry date: 1/21/92 (sh) [Entry date 01/21/92]

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2/18/92	—	RECORD on appeal consisting of Volumes I and II; returned from the Court of Appeals. (gc)
2/21/92	7	MINUTE ORDER: by Magistrate Judge Donald E. Abram; Rule 16 Conference held 2/14/92; Discovery ddl extended to 9/1/92; Pretrial Conference set for 1:35 p.m. on 9/11/92; the House of Representatives shall file its motion to change status to intervenor by 2/28/92; parties to submit a deposition schedule to the Mag. by 4/1/92. (cc: all counsel); entry date: 2/21/92 (sh)
2/26/92	8	MOTION by intervenor-defendant Speaker & Bipartisan to withdraw as intervening deft and to participate as Amici Curiae (sh)
3/5/92	9	ORDER by Judge Zita L. Weinshienk granting motion to withdraw as intervening defts and to participate as Amici Curiae [8-1] (cc: all counsel); entry date: 3/6/92 (sh) [Entry date 03/06/92]
3/26/92	10	MINUTE ORDER: by Judge Zita L. Weinshienk; Trial to court set for 10:30 a.m. on 10/26/92; Disp Motion ddl 7/27/92. (cc: all counsel); entry date: 3/26/92 (sh)

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3/27/92	11	NOTICE by plaintiff Adolph Coors Company of taking deposition of Dan Black on 4/27/92. (sh)
4/3/92	12	MOTION by defendant James-Baker, defendant Steve Higgins to amend Order of Court dates 3/26/92 to allow parties to 9/30/92 to file substantive motions. (sh)
4/3/92	13	BRIEF by defendant James-Baker, defendant Steve Higgins in support of motion to amend Order of Court dated 3/26/92 to allow parties to 9/30/92 to file substantive motions. [12-1] (sh)
4/8/92	14	MINUTE ORDER: by Judge Zita L. Weinshienk granting Deft's motion to amend Order of Court dated 3/26/92 to allow parties to 9/14/92 to file substantive motions [12-1], other than evidentiary motions in limine. Trial date to remain in full force and effect. (cc: all counsel); entry date: 4/9/92 (sh) [Entry date 04/09/92]
4/16/92	15	MINUTE ORDER: by Magistrate Judge Donald E. Abram; Telephone Status Conference set for 9:30 a.m. on 7/1/92. (cc: all counsel); entry date: 4/17/92 (sh) [Entry date 04/17/92]
4/27/92	16	NOTICE by plaintiff Adolph Coors Company of taking deposition of Dan Black on 6/1/92, and Req for Prod of documents. (sh)

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5/11/92	17	MINUTE ORDER: by Magistrate Judge Donald E. Abram; Mag Status Conf 9:30 7/1/92 (cc: all counsel); entry date: 5/11/92 (yk)
7/1/92	18	MINUTE ORDER: by Magistrate Judge Donald E. Abram—Plf and Defts to provide expert reports by 8/14/92. The Treasury Dept. is authorized to file an Amended Answer by 7/31/92. (cc: all counsel); entry date: 7/2/92 (sh) [Entry date 07/02/92]
7/7/92	19	ORDER by Judge Zita L. Weinshienk—Trial to court set to commence 10:30 a.m. on 10/26/92; Status Report ddl 9/17/92; Status Conference set for 8:30 a.m. on 9/24/92. (cc: all counsel); entry date: 7/8/92 (sh) [Entry date 07/08/92]
7/31/92	20	MOTION by plaintiff Adolph Coors Company, and defts to extend Pretrial Schedule. (sh)
7/31/92	21	AMENDED ANSWER by defendant James Baker, defendant Steve Higgins. (sh)
8/5/92	22	MINUTE ORDER: by Magistrate Judge Donald E. Abram granting Stipulated motion to extend Pretrial Schedule [20-1]. (cc: all counsel); entry date: 8/5/92 (sh)



## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
8/28/92	23	NOTICE by plaintiff Adolph Coors Company of taking deposition of Tim Ambler on 9/21/92. (sh)
8/31/92	24	NOTICE of Filing Defts' Expert Witness Report by defendant James Baker, defendant Steve Higgins. (sh) [Entry date 09/01/92]
8/31/92	25	Expert Witness Report for defendant James Baker, defendant Steve Higgins. (sh) [Entry date 09/01/92]
9/3/92	26	Amended NOTICE by plaintiff Adolph Coors Company of taking deposition of Tim Ambler on 9/21/92. (sh) [Entry date 09/04/92]
9/14/92	27	PRE-TRIAL ORDER by Magistrate Judge Donald E. Abram—no pending motions, discovery to be completed by 9/15/92, estimated trial to court time is 3 days. (cc: all counsel) (sh)
9/14/92	28	MEMORANDUM by Magistrate Judge Donald E. Abram re Pretrial Order [27-1], Discovery ddl 9/1/92 satisfied/removed; Disp Motion ddl 7/27/92 satisfied; Pretrial Conference held 1:35 9/11/92, terminating case referral to Magistrate Judge Donald E. Abram. (sh)
9/17/92	29	STATUS REPORT by defendants. (sh)
9/17/92	30	MOTION by defendants in limine, or, in the alternative, to continue the trial date. (sh)

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
9/17/92	31	BRIEF by defendants in support of motion in limine [30-1], motion to continue the trial date [30-2]. (sh)
9/21/92	32	Pretrial STATUS REPORT by plaintiff Adolph Coors Company. (sh)
9/21/92	33	Motion by defendants for summary judgment before Judge Zita L. Weinshienk. (sh)
9/21/92	34	EXHIBITS to Defts' Motion for Summ Judgment. (sh)
9/21/92	35	Memorandum BRIEF by defendants in support of motion for summary judgment before Judge Zita L. Weinshienk. [33-1] (Appears to be a faxed copy) (gc) [Entry date 09/22/92]
9/22/92	36	RESPONSE by plaintiff Adolph Coors Company to Defts' motion in limine [30-1], motion to continue the trial date [30-2]. (sh) [Entry date 09/23/92]
9/24/92	37	COURTROOM MINUTES by Judge Zita L. Weinshienk re Plf's Brief in Response to Deft's Motion for Summ Judgment [33-1] to be filed by 10/13/92. Denying Defts' motion in limine [30-1]; denying motion to continue the trial date [30-2]. Status Conference held 8:30 9/24/92; Trial to court set to commence 10:30 a.m. on 10/26/92. Simultaneous trial briefs to be filed by 10/19/92. Defts to file a Motion in Limine re the study con-



## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
		ducted in 1988 by 10/1/92. Counsel to provide depositions that the court has to read by 10/19/92. entry date: 9/24/92 (sh)
10/7/92	38	MOTION by defendants Nicholas Brady and Steve Higgins to amend Pretrial Order. (sh)
10/7/92	39	BRIEF by defendants Nicholas Brady & Steve Higgins in support of Defts' motion to amend Pretrial Order [38-1]. (sh)
10/7/92	40	NOTICE by defendants Nicholas Brady & Steve Higgins of Withdrawal of Defts' Expert Witness Report. (sh)
10/9/92	41	MINUTE ORDER: by Judge Zita L. Weinshienk — Status Conference set for 8:30 a.m. on 10/13/92. (cc: all counsel); entry date: 10/13/92 (sh)[Entry date 10/13/92]
10/13/92	42	COURTROOM MINUTES by Judge Zita L. Weinshienk re Plf's Brief re Deft's Motion for Summ Judgment [33-1] due 10/16/92; granting Defts' motion to amend Pretrial Order [38-1]. Status Conference held 8:30 10/13/92; Trial to Court set for 10/26/92 at 10:30 a.m. (for 3 days). entry date: 10/13/92 (sh)
10/15/92	43	RESPONSE by plaintiff Adolph Coors Company to Defts' motion for summary judgment before Judge Zita L. Weinshienk [33-1]. (sh) [Entry date 10/16/92]

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
10/19/92	44	NOTICE of Filing Deposition of Robert Rechholtz by defendant James Baker, defendant Steve Higgins. (sh) [Entry date 10/20/92]
10/19/92	45	STATEMENT — Designations of Deposition Transcripts — by defendants. (sh)[Entry date 10/20/92]
10/19/92	46	Trial brief submitted by defendant James Baker, defendant Steve Higgins. (sh) [Entry date 10/20/92]
10/19/92	47	STATEMENT — Transcript Designations — by plaintiff Adolph Coors Company. (sh) [Entry date 10/20/92]
10/19/92	48	Trial brief submitted by plaintiff Adolph Coors Company. (sh) [Entry date 10/20/92]
10/20/92	49	STIPULATED by parties re use of deposition of Timothy Ambler at Trial. (sh)
10/22/92	50	MINUTE ORDER: by Judge Zita L. Weinshienk denying Defts' motion for summary judgment before Judge Zita L. Weinshienk [33-1]. (cc: all counsel); entry date: 10/22/92 (sh)
10/26/92	51	COURTROOM MINUTES by Judge Zita L. Weinshienk Trial to court commenced 10:30 10/26/92. Opening statements. Deft's case-in-chief. Plf's case-in-chief. entry date: 10/29/92 (sh) [Entry date 10/29/92]

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
10/27/92	52	COURTROOM MINUTES by Judge Zita L. Weinshienk—Trial to Court Day 2—Plf's case-in-chief continues. Closing arguments. entry date: 10/29/92 (sh) [Entry date 10/29/92]
10/28/92	53	Certified Copy of TRANSCRIPT of proceedings—Trial to Court: Bench Ruling held before Judge Weinshienk on 10/28/92. (sh) [Entry date 10/29/92]
10/28/92	54	COURTROOM MINUTES by Judge Zita L. Weinshienk—Trial to Court Day 3—Court's findings & Conclusions. Order: the specific part of 27 U.S.C. Sec. 205(E)(2) prohibiting statements of the alcoholic content in the labeling of malt beverages is an unconstitutional restraint for commercial speech in violation of the First Amendment of the Consitution of the U.S. The ATF Bureau shall not enforce said statutory prohibition effective 11/9/92. Defts to have a stay of execution until 11/9/92. Exhibits returned to counsel. entry date: 10/30/92 (sh) [Entry date 10/30/92]
10/28/92	55	EXHIBIT list by plaintiff Adolph Coors Company. (sh) [Entry date 10/30/92]
10/28/92	56	EXHIBIT list by defendants. (sh) [Entry date 10/30/92]

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
10/28/92	57	Stipulation and ORDER re Custody of Exhibits by Judge Zita L. Weinshienk—counsel to retain exhibits until time to appeal has expired or all appellate proceedings have been terminated plus 60 days. (cc: all counsel); entry date: 10/30/92 (sh) [Entry date 10/30/92]
10/29/92	58	Declaratory JUDGMENT and Injunction: by Judge Weinshienk re Courtroom Trial Minutes [54-2]—the specific part of 27 U.S.C. Sec. 205 (e)(2) prohibiting statements of the alcoholic content in the labeling of malt beverages is an unconstitutional restraint on commercial speech in violation of the Frist Amendment of the U.S. Constitution. The ATF Bureau shall not enforce said statutory prohibition commencing 11/9/92. Defts to have a stay of execution until 11/9/92. Terminating case. (cc: all counsel); entry date: 10/30/92 (sh) [Entry date 10/30/92]
11/9/92	59	MOTION by James Baker, Steve Higgins to stay Enforcement of 10/29/92 Order of Court Pending Appeal. (sh)
11/9/92	60	BRIEF by defendants in support of Defts' motion to stay Enforcement of 10/29/92 Order of Court Pending Appeal [59-1]. (sh)

## DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
11/9/92	61	NOTICE OF APPEAL by defendants in re judgment of 10/29/92 [58-2]; Notice of transcript order form due 11/19/92; Notice mailed to all counsel on 11/10/92 Fee Status: USA (gc) [Entry date 11/10/92]

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

 No. 89-1203

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE UNITED STATES DEPT. OF THE TREASURY;  
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR  
OF BATB, DEFENDANTS

and

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF  
THE U.S. HOUSE OF REPRESENTATIVES,  
DEFENDANT-INTERVENOR-APPELLANT

CENTER FOR SCIENCE IN THE PUBLIC INTEREST;  
G. HEILEMAN BREWING COMPANY, AMICI CURIAE

## DOCKET ENTRIES

DATE	NR	PROCEEDINGS
7/12/89	1	[360313] Civil case docketed. Preliminary record filed. Transcript order form due 7/10/89 for Paul Zuckerman pursuant to R.42.1 Appellant/Petitioner's brief due 8/9/89 for Speaker Appellant's designation of record due 8/9/89 for Speaker Notice of appearance due 7/24/89 for Jania Jaruzelski, for K. Preston Oade, for Thomas J. Carney (kmh) [89-1203]



DATE	NR	PROCEEDINGS
7/12/89	2	[360325] Docketing statement filed by Speaker. Original and 4 copies c/s: y. (kmh) [89-1203]
7/12/89	4	[360549] Notice received from Appellant Speaker that transcript necessary for this appeal is already on file in district court. (kmh) [89-1203]
7/19/89	7	[368154] Notice of appearance filed by K. Preston Oade as attorney for Adolph Coors Company. CERT. OF INTERESTED PARTIES (y/n): n (tc) [89-1203]
7/19/89	8	[368184] Notice of appearance filed by Jania Jaruzelski, Charles Tiefer, Steven R. Ross as attorney for Speaker. CERT. OF INTERESTED PARTIES (y/n): y (tc) [89-1203]
8/7/89	9	[368560] Appellant's stipulated motion filed by Appellant Speaker in 89-1203 to extend time to file appellant's brief until 9/5/89 [89-1203]. Original and 3 copies c/s: y (kmh) [89-1203]
8/8/89	10	[368561] Order filed by RLH granting Appellant/Petitioner motion to extend time to file apet brief and designation of record to 9/5/89. [368560-1] (kmh) [89-1203]
8/29/89	13	[373430] Appellant's motion filed by Appellant Speaker in 89-1203 to extend time to file appellant's brief until 10/5/89 [89-1203]. Original and 3 copies c/s: y (kmh) [89-1203]

DATE	NR	PROCEEDINGS
9/1/89	14	[373432] Order filed by RLH granting Appellant/Petitioner motion to extend time to file apet brief to 10/5/89. [373430-1] (kmh) [89-1203]
10/5/89	16	[380725] Motion for leave to become amicus [89-1203] filed by Center for Science in 89-1203. Original and 3 copies. c/s: y (kas) [89-1203]
10/5/89	17	[380733] Memorandum in support of motion leave to become amicus motion leave to become amicus filed by Center for Science in 89-1203. Original and 3 copies. c/s: y (kas) [89-1203]
10/5/89	19	[380741] amicus brief received from Center for Science in 89-1203, but not filed. Original and 7 copies. c/s: y (kas) [89-1203]
10/5/89	22	[382277] Brief filed by Amicus Curiae Center for Science in 89-1203. Original and 7 copies. c/s: y (kmh) [89-1203]
10/10/89	18	[380735] Motion(s) motion leave to become amicus filed by Amicus Curiae Center for Science in 89-1203 submitted to panel. (kas) [89-1203]
10/16/89	20	[382267] Order filed by Judge(s) Moore, Ebel granting motion leave to become amicus of Center for Science . . . [380725-1] Notice of appearance due 10/26/89 for Bruce A. Silverglade (kmh) [89-1203]
10/23/89	27	[385114] Appellee's stipulated motion to consolidate appeals [89-1203, 89-1239] filed by Adolph Coors Company in



DATE	NR	PROCEEDINGS
		89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/23/89	31	[385122] Appellee's motion to extend time to file appellee's brief until 12/20/89 filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/27/89	28	[385115] Order filed by RLH denying Appellee/Respondent motion to consolidate appeals. Appellee shall file one consolidated response brief of no more than 50 pages on or before 12/20/89. [385114-1] in 89-1203, 89-1239 (kmh) [89-1203 89-1239]
10/27/89	32	[385150] Order filed by RLH granting Appellee/Respondent motion to extend time to file res brief [385122-1] 12/20/89 for Adolph Coors Company in 89-1203, for Adolph Coors Company in 89-1239 (kmh) [89-1203 89-1239]
11/6/89	36	[387798] Amicus brief received from G. Heileman Brewing in 89-1203, but not filed. Original and 7 copies. c/s: y (kmh) [89-1203]
11/6/89	37	[388229] Notice of appearance filed by Bruce A. Silverglade in 89-1203 as attorney for Center for Science in 89-1203. CERT. OF INTERESTED PARTIES (y/n): n (kmh) [89-1203]

DATE	NR	PROCEEDINGS
11/6/89	43	[388326] Notice of appearance filed by Erin K. Toll in 89-1203, Joseph E. Meyer in 89-1203 as attorney for G. Heileman Brewing in 89-1203. CERT. OF INTERESTED PARTIES (y/n): y (kmh) [89-1203]
11/6/89	44	[388327] Notice of appearance filed by Reid L. Ashinoff in 89-1203 as attorney for G. Heileman Brewing in 89-1203. CERT. OF INTERESTED PARTIES (y/n): y (kmh) [89-1203]
11/13/89	35	[387797] Motion(s) motion leave to become amicus, motion to present oral argument filed by Amicus Curiae G. Heileman Brewing in 89-1203 submitted to panel. (kmh) [89-1203]
11/13/89	39	[388266] Motion for leave to become amicus [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
11/13/89	40	[388267] Motion(s) motion leave to become amicus in 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
11/13/89	41	[388268] Motion to participate in oral argument [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
11/13/89	42	[388269] Motion(s) motion to participate in 89-1203, 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
11/24/89	45	[390328] Order filed by Judge(s) Moore, Ebel granting motion leave to become amicus [388266-1], denying motion to participate [388268-1] (kas) [89-1203]
11/24/89	50	[395206] Brief filed by Amicus Curiae G. Heileman Brewing in 89-1203. Original and 7 copies. c/s: y (kmh) [89-1203]
12/4/89	48	[395068] Appellant's brief filed by Speaker in 89-1203. Original and 8 copies. c/s: y. Served on 12/1/89 (kmh) [89-1203]
12/26/89	51	[397685] Appellee's motion to include additional items in the record on appeal filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (tas) [89-1203 89-1239]
12/26/89	55	[398886] Designation of record filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 1 copies. [89-1203, 89-1239] (kmh) [89-1203 89-1239]
12/26/89	56	[402620] Appellee's brief filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 7 copies. c/s: y. Served on 12/20/89 Oral Argument? y (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
1/2/90	52	[397688] Order filed by RLH granting in part Appellee/Respondent motion to include additional items in the record on appeal [397685-1] in 89-1203, 89-1239 (tas) [89-1203 89-1239]
1/5/90	59	[402629] Addendum to brief filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 2 copies. c/s: y (kmh) [89-1203 89-1239]
1/24/90	57	[402625] Order filed by RLH—designation of record due 2/5/90 for Speaker pursuant to Rule 42. (kmh) [89-1203]
2/12/90	61	[407701] Designation of record filed by Appellant Speaker in 89-1203. Original and 3 copies. [89-1203] (kmh) [89-1203]
2/12/90	62	[407702] Appellant's motion filed by Appellant Speaker in 89-1203 to supplement the record on appeal. Original and 3 copies c/s: y (kmh) [89-1203]
2/13/90	63	[407703] Order filed by RLH granting Appellant/Petitioner motion to supplement the record on appeal [407702-1] (kmh) [89-1203]
2/13/90	64	[407705] Order filed by Judge(s) Holloway—Record on Appeal due 2/23/90 for Zita L. Weinshienk in 89-1203, for Zita L. Weinshienk in 89-1239 pursuant to Rule 11.1. (kmh) [89-1203 89-1239]
2/21/90	65	[409756] Record on appeal filed: 2 Volume(s)—Copy filed in Volume(s) (y/n): n. Volume I (pleadings) Volume II (transcript). original. (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
8/23/90	67	[450953] Hearing set for November, 1990 Session, at Denver. (sks) [89-1114 89-1122 89-1137 89-1203 89-1239 89-1247 89-1255 89-1310]
11/6/90	68	[466143] Case argued and submitted to Judges McKay, McWilliams, Seymour. (sls) [89-1203 89-1239]
6/14/91	70	[519667] Appellee's motion to take judicial notice of the positions of United States Surgeon General and Inspector General on the desirability of alcohol content labeling on malt beverages [89-1203, 89-1239] filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
6/25/91	71	[521282] Supplement to motion to take judicial notice received from Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
7/15/91	72	Motion that the court take notice of the propose marketing based on alcohol content, of the malt beverage "Powermaster" and the ensuing public debate, including the position taken on the issue by the surgeon general of the United States filed by Speaker in 89-1203, 89-1239 [89-1203, 89-1239]; submitted to panel. (kc) [89-1203 89-1239]
8/1/91	73	[529825] Appellee's response filed by Adolph Coors Company in 89-1203 motion for general relief and submitted to

DATE	NR	PROCEEDINGS
		panel. Original and 3 copies. c/s: y (kc) [89-1203]
9/23/91	74	[541300] Terminated on the Merits after Oral Hearing; Judgment is Reversed and cause is Remanded; Written, Signed, Published. McKay, panel member; McWilliams, panel member; Seymour, authoring judge. [89-1203, 89-1239] (afw) [89-1203 89-1239]
10/2/91	75	[543501] Bill of costs filed by Appellant Brady in 89-1203, Appellant Steve Higgins in 89-1239, Original and 4 copies. c/s: y. (fg) [89-1203 89-1239]
10/16/91	76	[546545] Statement of costs in favor of Appellant in 89-1203, Appellant in 89-1239 filed. (fg) [89-1203 89-1239]
11/8/91	77	[551285] Statement of costs issued for Appellants in 89-1203, and 89-1239 against Appellees in 89-1203, and in 89-1239 in the amount of \$198.00. (afw) [89-1203 89-1239]
11/8/91	78	[551287] Mandate issued to district court. Mandate receipt due 12/9/91 in 89-1203, in 89-1239 Record on appeal return due 3/7/92 in 89-1203, in 89-1239 (afw) [89-1203 89-1239]
11/12/91	79	[551759] Mandate receipt filed. (kc) [89-1203 89-1239]
2/11/92	81	[571553] Record returned Volumes: II VOLS. Record receipt due 3/12/92 in 89-1203, in 89-1239 (gl) [89-1203 89-1239]
2/19/92	82	[573408] Record receipt filed. (gl) [89-1203]



IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 89-1239

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE UNITED STATES DEPT. OF THE TREASURY;  
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR  
OF BATB, DEFENDANTS-APPELLANTS

and

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF  
THE U.S. HOUSE OF REPRESENTATIVES,  
DEFENDANT-INTERVENOR

G. HEILEMAN BREWING COMPANY, AMICUS CURIAE

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
8/2/89	1	[365661] Civil case docketed. Preliminary record filed. Transcript order form due 8/7/89 for Paul Zuckerman pursuant to R.42.1 Docketing statement due 8/14/89 for Steve Higgins, for James Baker Appellant/Petitioner's brief due 9/5/89 for Steve Higgins Appellant's designation of record due 9/5/89 for Steve Higgins Notice of appearance due 8/14/89 for Thomas Millet, for Sandra M. Schraibman, for William G. Pharo, for Thomas Millet, for Sandra M. Schraibman, for Stuart E. Schiffer, for Thomas Millet, for Sandra M. Schraibman, for William G. Pharo, for K. Preston Oade, for Thomas J. Carnev (tc) [89-1239]

DATE	NR	PROCEEDINGS
8/3/89	2	[366776] Docketing statement filed by James Baker in 89-1239, Steve Higgins in 89-1239. Original and 4 copies c/s: y. (tc) [89-1239]
8/11/89	7	[372053] Notice of appearance filed by Irene M. Solet and John F. Cordes in 89-1239 as attorneys for James Baker and Steve Higgins. CERT. OF INTERESTED PARTIES (y/n): y (klb) [89-1239]
8/15/89	5	[368863] Notice received from Appellant James Baker in 89-1239, Appellant Steve Higgins in 89-1239 that a transcript is not necessary for this appeal. (transcript already on file in district court). (kmh) [89-1239]
8/15/89	11	[373595] Notice of appearance filed by K. Preston Oade in 89-1239 as attorney for Adolph Coors Company in 89-1239. CERT. OF INTERESTED PARTIES (y/n): n (klb) [89-1239]
8/29/89	9	[373427] Appellant's motion filed by Appellant James Baker in 89-1239, Appellant Steve Higgins in 89-1239 to extend time to file appellant's brief until 10/5/89 [89-1239]. Original and 3 copies c/s: y (kmh) [89-1239]
9/1/89	10	[373428] Order filed by RLH granting Appellant/Petitioner motion to extend time to file apet brief to 10/5/89. [373427-1] (kmh) [89-1239]
10/6/89	14	[383701] Appellant's brief received but not filed by James Baker in 89-1239, Steve Higgins in 89-1239. 10/30/89 for Steve Higgins, for James Baker (kas) [89-1239]



DATE	NR	PROCEEDINGS
10/6/89	16	[383859] Notice of appearance filed by John S. Koppel in 89-1239 as attorney for Speaker in 89-1239. CERT. OF INTERESTED PARTIES (y/n): n (kas) [89-1239]
10/6/89	21	[387399] Appellant's brief filed by James Baker, Steve Higgins. Original and 7 copies. c/s: y. Served on 10/5/89 (kas) [89-1239]
10/6/89	34	[402624] Designation of record filed by Appellant James Baker, Appellant Steve Higgins. Original and 1 copies. [89-1239] (kmh) [89-1239]
10/23/89	17	[385114] Appellee's stipulated motion to consolidate appeals [89-1203, 89-1239] filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/23/89	19	[385122] Appellee's motion to extend time to file appellee's brief until 12/20/89 filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/27/89	18	[385115] Order filed by RLH denying Appellee/Respondent motion to consolidate appeals. Appellee shall file one consolidated response brief of no more than 50 pages on or before 12/20/89. [385114-1] in 89-1203, 89-1239 (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
10/27/89	20	[385150] Order filed by RLH granting Appellee/Respondent motion to extend time to file res brief [385122-1] 12/20/89 for Adolph Coors Company in 89-1203, for Adolph Coors Company in 89-1239 (kmh) [89-1203 89-1239]
11/13/89	23	[388266] Motion for leave to become amicus [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
11/13/89	24	[388267] Motion(s) motion leave to become amicus in 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
11/13/89	25	[388268] Motion to participate in oral argument [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
11/13/89	26	[388269] Motion(s) motion to participate in 89-1203, 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
12/26/89	29	[397685] Appellee's motion to include additional items in the record on appeal filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (tas) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
12/26/89	31	[398886] Designation of record filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 1 copies. [89-1203, 89-1239] (kmh) [89-1203 89-1239]
12/26/89	33	[402620] Appellee's brief filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 7 copies. c/s: y. Served on 12/20/89 Oral Argument? y (kmh) [89-1203 89-1239]
1/2/90	30	[397688] Order filed by RLH granting in part Appellee/Respondent motion to include additional items in the record on appeal [397685-1] in 89-1203, 89-1239 (tas) [89-1203 89-1239]
1/5/90	35	[402629] Addendum to brief filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 2 copies. c/s: y (kmh) [89-1203 89-1239]
1/9/90	32	[401391] Appellant's reply brief filed by James Baker in 89-1239, Steve Higgins in 89-1239. Original and 7 copies. c/s: y (kmh) [89-1239]
2/13/90	36	[407705] Order filed by Judge(s) Holloway—Record on Appeal due 2/23/90 for Zita L. Weinshienk in 89-1203, for Zita L. Weinshienk in 89-1239 pursuant to Rule 11.1. (kmh) [89-1203 89-1239]
2/21/90	37	[409756] Record on appeal filed: 2 Volume(s)—Copy filed in Volume(s) (y/n): n.

DATE	NR	PROCEEDINGS
		Volume I (pleadings) Volume II (transcript). original. (kmh) [89-1203 89-1239]
8/23/90	39	[450953] Hearing set for November, 1990 Session, at Denver. (sks) [89-1114 89-1122 89-1137 89-1203 89-1239 89-1247 89-1255 89-1310]
11/6/90	40	[466143] Case argued and submitted to Judges McKay, McWilliams, Seymour. (sls) [89-1203 89-1239]
6/14/91	42	[519667] Appellee's motion to take judicial notice of the positions of United States Surgeon General and Inspector General on the desirability of alcohol content labeling on malt beverages [89-1203, 89-1239] filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
6/25/91	43	[521282] Supplement to motion to take judicial notice received from Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
7/15/91	44	Motion that the court take notice of the propose marketing based on alcohol content, of the malt beverage "Powermaster" and the ensuing public debate, including the position taken on the issue by the surgeon general of the United States filed by Speaker in 89-1203, 89-1239 [89-1203, 89-1239]; submitted to panel. (kc) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
9/23/91	45	[541300] Terminated on the Merits after Oral Hearing; Judgment is Reversed and cause is Remanded; Written, Signed, Published. McKay, panel member; McWilliams, panel member; Seymour, authoring judge. [89-1203, 89-1239] (afw) [89-1203 89-1239]
10/2/91	46	[543501] Bill of costs filed by Appellant Brady in 89-1203, Appellant Steve Higgins in 89-1239, Original and 4 copies. c/s: y. (fg) [89-1203 89-1239]
10/16/91	47	[546545] Statement of costs in favor of Appellant in 89-1203, Appellant in 89-1239 filed. (fg) [89-1203 89-1239]
11/8/91	48	[551285] Statement of costs issued for Appellants in 89-1203, and 89-1239 against Appellees in 89-1203, and in 89-1239 in the amount of \$198.00. (afw) [89-1203 89-1239]
11/8/91	49	[551287] Mandate issued to district court. Mandate receipt due 12/9/91 in 89-1203, in 89-1239 Record on appeal return due 3/7/92 in 89-1203, in 89-1239 (afw) [89-1203 89-1239]
11/12/91	50	[551759] Mandate receipt filed. (kc) [89-1203 89-1239]
2/11/92	52	[571553] Record returned Volumes: II VOLS. Record receipt due 3/12/92 in 89-1203, in 89-1239 (gl) [89-1203 89-1239]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY  
OF  
THE UNITED STATES DEPARTMENT OF TREASURY;  
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR  
OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
DEFENDANTS-APPELLANTS

and

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF  
THE U.S. HOUSE OF REPRESENTATIVES,  
DEFENDANT-INTERVENOR

**DOCKET ENTRIES**

DATE	NR	PROCEEDINGS
11/13/92	1	[633648] Civil case docketed. Preliminary record filed. Transcript order form due 11/23/92 for Paul Zuckerman pursuant to R.42.1 Docketing statement due 11/23/92 for Steve Higgins, for Nicholas Brady. Notice of appearance due 11/23/92 for Speaker & Bipartisan, for Steve Higgins, for Nicholas Brady, for Adolph Coors Company. (mbm)
11/17/92	2	[634060] Motion filed by Appellant Nicholas Brady and appellant Steve Higgins for stay of pending appeal [92-1348]. Original and 4 copies c/s: y. (mbm)



DATE	NR	PROCEEDINGS
11/18/92	1	[634781] Acknowledgement of transcript order filed by attorneys for appellants. (afw)
11/18/92	6	[634812] Docketing statement filed by Nicholas Brady, Steve Higgins. Original and 4 copies c/s: y. (mbm)
11/19/92	5	[634783] Transcript order form filed by Paul Zuckerman. Transcript due 1/19/93 for Paul Zuckerman. (afw)
11/24/92	7	[635858] Appellee's response Brief in opposition filed by Adolph Coors Company to Appellant/Petitioner motion for stay of proceedings pending appeal. Original and 3 copies. c/s: y (fg)
12/3/92	12	[639440] Appellant's motion for stay submitted to panel. (afw)
12/4/92	8	[638193] Notice of appearance filed by John S. Koppel, Michael J. Singer as attorney for Nicholas Brady, Steve Higgins. CERT. OF INTERESTED PARTIES (y/n): y. (pdw)
12/4/92	9	[638199] Reply filed by Nicholas Brady, Steve Higgins to Appellee's response to motion for stay. Original and 3 copies. c/s: y. (pdw)
12/11/92	13	[639774] Order filed by Judges McKay, Baldock denying Appellant's motion for stay pending appeal. Parties served by mail. (pdw)
1/4/93	15	[645443] Filed notice record is complete 12/31/92. Appellant/Petitioner's brief due 2/9/93 for Steve Higgins, for Nicho-

DATE	NR	PROCEEDINGS
		las Brady Appellant/Petitioner's appendix due 2/9/93 for Steve Higgins, for Nicholas Brady (afw)
1/6/93	14	[645069] Appellant's motion filed by Nicholas Brady, Steve Higgins to expedite case [92-1348]. Original and 3 copies. c/s: y. (pdw)
1/11/93	16	[646191] Appellant's motion to expedite case submitted to panel. (pdw)
1/19/93	17	[647763] Appellee's response to "Motion to Expedite Oral Argument" filed by Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
1/19/93	18	[647772] Response filed by Adolph Coors Company Document [647763-1] submitted to panel. (mbm)
1/28/93	19	[650206] Order filed by Judges Seymour, Brorby granting Appellant's motion to expedite case—"This appeal shall be set for argument the week of May 10 to 14, 1993. Absent extraordinary circumstances, no extensions of time will be granted." [645069-1] Parties served by mail. (pdw)
2/4/93	21	[652018] Order filed by RLH notice of appearance form due 2/16/93 for Adolph Coors Company. Parties served mail. (afw)
2/12/93	22	[654258] Appellant's brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y. Served on 2/9/93. Oral argument? y. Appendix filed. Original and 1 appendix copy. Appellee/Respon-

DATE	NR	PROCEEDINGS
		dent's brief due 3/15/93 for Adolph Coors Company (mbm)
2/16/93	23	[654735] Notice of appearance filed by K. Preston Oade as attorney for Adolph Coors Company. CERT. OF INTERESTED PARTIES (y/n): n Attorney Thomas J. Carney terminated for Adolph Coors Company (afw)
2/22/93	24	[656196] Hearing set for May 1993 Session, at Denver. (sls)
3/15/93	26	[661924] Appellee's brief filed by Adolph Coors Company. Original and 7 copies. c/s: y. Served on 3/15/93. Oral Argument? y. Appellant's optional reply brief due 4/1/93 for Steve Higgins, for Nicholas Brady. (pdw)
3/15/93	28	[661932] Addendum to brief filed by Appellee Adolph Coors Company. c/s: y. (pdw)
3/16/93	27	[661929] Appellee's brief submitted to panel. (pdw)
3/26/93	29	[664317] Appellee's motion [92-1348] to file supplemental addendum filed by Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
3/26/93	52	[685195] Supplemental Addendum to brief filed by Appellee Adolph Coors Company (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
4/2/93	30	[665879] Appellee's motion to file appendix submitted to panel. (sls)

DATE	NR	PROCEEDINGS
4/2/93	31	[666089] Appellant's reply brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y (fg)
4/2/93	32	[666102] Appellant's motion "For Leave To File Supplemental Appendix" filed by Appellant Nicholas Brady, Appellant Steve Higgins [92-1348]. Original and 2 copies c/s: y (fg)
4/2/93	53	[685196] Supplemental Appendix filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original and 1 copy. c/s: y. (pdw)
4/5/93	34	[666281] Appellant's motion for general relief (for leave to file a supplemental appendix) submitted to panel. (sls)
4/19/93	35	[670552] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)
4/26/93	36	[672266] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's Supplemental Authority and submitted to panel. Original and 3 copies. c/s: y. (pdw)
4/28/93	37	[673325] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 8 copies. c/s: y (fg)
4/28/93	38	[673333] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)

DATE	NR	PROCEEDINGS
4/29/93	39	[673509] Appellant's settlement conference report filed. Original and 3 copies. (pdw)
5/4/93	40	[674685] Appellant's response to "Plaintiff's Second Supplemental Authority" filed by Steve Higgins, Nicholas Brady Original and 3 copies. c/s: y (fg)
5/4/93	41	[674695] Appellant's response filed by Steve Higgins, Nicholas Brady Document [674685-1] Appellant/Petitioner response Null Relief Code filed by Appellant Steve Higgins, Nicholas Brady submitted to panel. (fg)
5/5/93	42	[675214] Appellee's motion "For Leave To File Record" [92-1348] filed by Adolph Coors Company. Original and 7 copies. c/s: y (fg)
5/5/93	54	[685202] Addendum to brief (referred to in motion to file "record," consists of 10 volumes) filed by Appellee Adolph Coors Company. Original only. c/s: y. (pdw)
5/11/93	43	[676387] Order filed by RLH referring Appellee/Respondent motion for general relief [675214-1] REFERRED TO PANEL ON THE MERITS. Parties served by mail. (fg)
5/11/93	44	[677205] Case argued and submitted to Judges Tacha, Barrett, Brown. (sls)
5/17/93	46	[677937] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's motion for leave to file record and submitted to panel. Original and 3 copies. c/s: y. (pdw)

DATE	NR	PROCEEDINGS
5/19/93	47	[678327] Motion to file record relief filed by Appellee Adolph Coors Company submitted to panel. (pdw)
5/21/93	48	[679126] Appellant's motion filed "For Leave To File Exhibits" by Appellant Steve Higgins, Appellant Nicholas Brady [92-1348]. Original and 3 copies c/s: y (fg)
5/21/93	50	[679128] Appellant's motion(s) Appellant/Petitioner motion for "Leave To File Exhibits" submitted to panel. One set of exhibits was filed and is being submitted with the motion to Judge Tacha. (fg)
5/21/93	56	[685207] Exhibits filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
6/15/93	51	[685178] Order filed by Judges Tacha, Barrett, Brown granting Appellee's motion to file appendix [664317-1], granting Appellant's motion to file supplemental appendix [666102-1], granting Appellee's motion for "leave to file record" [675214-1], granting Appellant's motion "for leave to file exhibits" [679126-1] Parties served by mail. (pdw)
6/28/93	57	[688314] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 3 copies. c/s: y (mbm)
8/23/93	58	[701222] Terminated on the Merits after Oral Hearing; Judgment is Affirmed; Written, Signed, Published. Tacha, authoring judge; Barrett; Brown. [92-1348] (afw)



DATE	NR	PROCEEDINGS
10/4/93	59	[711548] Appellant's motion filed by Appellant Steve Higgins, Appellant Nicholas Brady to extend time to file petition for rehearing until 10/21/93 [92-1348]. Original and 3 copies c/s: y (mbm)
10/6/93	60	[712161] Order filed by RLH granting Appellant/Petitioner motion to extend time to file petition for rehearing [711548-1] Parties served by mail. (mbm)
10/21/93	61	[716067] Appellant's motion filed by Steve Higgins, Nicholas Brady to extend time to file petition for rehearing until 11/1/93 [92-1348]. Original and 3 copies. c/s: y. (pdw)
10/26/93	62	[716878] Appellant's motion to extend time to file petition for rehearing until 11/1/93 submitted to panel. (pdw)
10/29/93	63	[717775] Order filed by Judges Tacha, Barrett, Brown granting Appellant's motion to extend time to file petition for rehearing until 11/1/93. NO FURTHER EXTENSIONS WILL BE CONSIDERED [716067-1] Parties served by mail. (pdw)
11/1/93	64	[718191] Petition for rehearing in banc [92-1348] filed by Nicholas Brady, Steve Higgins. Original and 14 copies. c/s: y (fg)
11/1/93	65	[718193] Document [718191-1] Petition for rehearing in banc filed by Appellant Nicholas Brady, Steve Higgins submitted to panel. (fg)

DATE	NR	PROCEEDINGS
11/3/93	68	[718933] FIRST notice of rules violation for Michael J. Singer for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
11/3/93	69	[718935] FIRST notice of rules violation for John S. Koppel for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
12/1/93	70	[724642] Order filed by Judge(s) McKay, Logan, Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Barrett, Brown denying Petition for rehearing in banc [718191-1] (fg)
12/9/93	71	[727019] Mandate issued. Mandate receipt due 1/10/94 (mbm)
12/9/93	72	[727291] Mandate receipt filed. (afw)
2/1/94	73	[738546] Case file closed. 2/1/96 (bpm)
4/26/94	74	[761101] Petition for writ of certiorari filed on 4/15/94 by Appellant Nicholas Brady. Supreme Court Number 93-1631. (afw)
6/17/94	75	[774276] Supreme Court order dated 6/13/94 granting certiorari filed. (pdw)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY  
OF THE UNITED STATES DEPARTMENT OF TREASURY;  
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF  
THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
DEFENDANT-APPELLANTS

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE  
U.S. HOUSE OF REPRESENTATIVES,  
DEFENDANT-INTERVENOR

DOCKET ENTRIES

DATE	PROCEEDINGS
11/13/92	[633648] Civil case docketed. Preliminary record filed. Transcript order form due 11/23/92 for Paul Zuckerman pursuant to R.42.1 Docketing statement due 11/23/92 for Steve Higgins, for Nicholas Brady. Notice of appearance due 11/23/92 for Speaker & Bipartisan, for Steve Higgins, for Nicholas Brady, for Adolph Coors Company. (mbm)
11/17/92	[634060] Motion filed by Appellant Nicholas Brady and appellant Steve Higgins for stay of pending appeal [92-1348]. Original and 4 copies c/s: y. (mbm)

DATE	PROCEEDINGS
11/18/92	[634781] Acknowledgement of transcript order filed by attorneys for appellants. (afw)
11/18/92	[634812] Docketing statement filed by Nicholas Brady, Steve Higgins. Original and 4 copies c/s: y. (mbm)
11/19/92	[634783] Transcript order form filed by Paul Zuckerman. Transcript due 1/19/93 for Paul Zuckerman. (afw)
11/24/92	[635858] Appellee's response Brief in opposition filed by Adolph Coors Company to Appellant/Petitioner motion for stay of proceedings pending appeal. Original and 3 copies. c/s: y (fg)
12/3/92	[639440] Appellant's motion for stay submitted to panel. (afw)
12/4/92	[638193] Notice of appearance filed by John S. Koppel, Michael J. Singer as attorney for Nicholas Brady, Steve Higgins. CERT. OF INTERESTED PARTIES (y/n): y. (pdw)
12/4/92	[638199] Reply filed by Nicholas Brady, Steve Higgins to Appellee's response to motion for stay. Original and 3 copies. c/s: y. (pdw)
12/11/92	[639774] Order filed by Judges McKay, Baldock denying Appellant's motion for stay pending appeal. Parties served by mail. (pdw)
1/4/93	[645443] Filed notice record is complete 12/31/92. Appellant/Petitioner's brief due 2/9/93 for Steve Higgins, for Nicholas Brady Appellant/Petitioner's appendix due 2/9/93 for Steve Higgins, for Nicholas Brady (afw)
1/6/93	[645069] Appellant's motion filed by Nicholas Brady, Steve Higgins to expedite case

DATE	PROCEEDINGS
	[92-1348]. Original and 3 copies. c/s: y. (pdw)
1/11/93	[646191] Appellant's motion to expedite case submitted to panel. (pdw).
1/19/93	[647763] Appellee's response to "Motion to Expedite Oral Argument" filed Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
1/19/93	[647772] Response filed by Adolph Coors Company Document [647763-1] submitted to panel. (mbm)
1/28/93	[650206] Order filed by Judges Seymour, Brorby granting Appellant's motion to expedite case—"This appeal shall be set for argument the week of May 10 to 14, 1993. Absent extraordinary circumstances, no extensions of time will be granted." [645069-1] Parties served by mail. (pdw)
2/4/93	[652018] Order filed by RLH notice of appearance form due 2/16/93 for Adolph Coors Company. Parties served mail. (afw)
2/12/93	[654258] Appellant's brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y. served on 2/9/93. Oral argument? y. Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 3/15/93 for Adolph Coors Company (mbm)
2/16/93	[654735] Notice of appearance filed by K. Preston Oade as attorney for Adolph Coors Company. CERT. OF INTERESTED PARTIES (y/n): n Attorney Thomas J. Carney terminated for Adolph Coors Company (afw)
2/22/93	[656196] Hearing set for May 1993 Session, at Denver. (sls)

DATE	PROCEEDINGS
3/15/93	[661924] Appellee's brief filed by Adolph Coors Company. Original and 7 copies. c/s: y. Served on 3/15/93. Oral Argument? y. Appellant's optional reply brief due 4/1/93 for Steve Higgins, for Nicholas Brady. (pdw)
3/15/93	[661932] Addendum to brief filed by Appellee Adolph Coors Company. c/s: y. (pdw)
3/16/93	[661929] Appellee's brief submitted to panel. (pdw)
3/26/93	[664317] Appellee's motion [92-1348] to file supplemental addendum filed by Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
3/26/93	[685195] Supplemental Addendum to brief filed by Appellee Adolph Coors Company (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
4/2/93	[665879] Appellee's motion to file appendix submitted to panel. (sls)
4/2/93	[666089] Appellant's reply brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y (fg)
4/2/93	[666102] Appellant's motion "For Leave To File Supplemental Appendix" filed by Appellant Nicholas Brady, Appellant Steve Higgins [92-1348]. Original 2 copies c/s: y (fg)
4/2/93	[685196] Supplemental Appendix filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original and 1 copy. c/s: y. (pdw)
4/5/93	[666281] Appellant's motion for general relief (for leave to file a supplemental appendix) submitted to panel. (sls)



DATE	PROCEEDINGS
4/19/93	[670552] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)
4/26/93	[672266] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's Supplemental Authority and submitted to panel. Original and 3 copies. c/s: y (pdw)
4/28/93	[673325] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 8 copies. c/s: y (fg)
4/28/93	[673333] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)
4/29/93	[673509] Appellant's settlement conference report filed. Original and 3 copies. (pdw)
5/4/93	[674685] Appellant's response to "Plaintiff's Second Supplemental Authority" filed by Steve Higgins, Nicholas Brady. Original and 3 copies. c/s: y (fg)
5/4/93	[674695] Appellant's response filed by Steve Higgins, Nicholas Brady Document [674685-1] Appellant/Petitioner response Null Relief Code filed by Appellant Steve Higgins, Nicholas Brady submitted to panel. (fg)
5/5/93	[675214] Appellee's motion "For Leave To File Record" [92-1348] filed by Adolph Coors Company. Original and 7 copies. c/s: y (fg)
5/5/93	[685202] Addendum to brief (referred to in motion to file "record," consists of 10 volumes) filed by Appellee Adolph Coors Company. Original only. c/s: y. (pdw)

DATE	PROCEEDINGS
5/11/93	[676387] Order filed by RLH referring Appellee/Respondent motion for general relief [675214-1] REFERRED TO PANEL ON THE MERITS. Parties served by mail. (fg)
5/11/93	[677205] Case argued and submitted to Judges Tacha, Barrett, Brown. (sls)
5/17/93	[677937] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's motion for leave to file record and submitted to panel. Original and 3 copies. c/s: y. (pdw)
5/19/93	[678327] Motion to file record relief filed by Appellee Adolph Coors Company submitted to panel. (pdw)
5/21/93	[679126] Appellant's motion filed "For Leave To File Exhibits" by Appellant Steve Higgins, Appellant Nicholas Brady [92-1348]. Original and 3 copies c/s: y (fg)
5/21/93	[679128] Appellant's motion(s) Appellant/Petitioner motion for "Leave To File Exhibits" submitted to panel. One set of exhibits was filed and is being submitted with the motion to Judge Tacha. (fg)
5/21/93	[685207] Exhibits filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
6/15/93	[685178] Order filed by Judges Tacha, Barrett, Brown granting Appellee's motion to file appendix [664317-1], granting Appellant's motion to file supplemental appendix [666102-1], granting Appellee's motion for "leave to file record" [675214-1], granting Appellant's motion "for leave to file exhibits" [679126-1] Parties served by mail. (pdw)

DATE	PROCEEDINGS
6/28/93	[688314] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 3 copies. c/s: y (mbm)
8/23/93	[701222] Terminated on the Merits after Oral Hearing: Judgment is Affirmed; Written, Signed, Published. Tacha, authoring judge; Barrett; Brown. [92-1348] (afw)
10/4/93	[711548] Appellant's motion filed by Appellant Steve Higgins, Appellant Nicholas Brady to extend time to file petition for rehearing until 10/21/93 [92-1348]. Original and 3 copies. c/s: y (mbm)
10/6/93	[712161] Order filed by RLH granting Appellant/Petitioner motion to extend time to file petition for rehearing [711548-1] Parties served by mail. (mbm)
10/21/93	[716067] Appellant's motion filed by Steve Higgins, Nicholas Brady to extend time to file petition for rehearing until 11/1/93 [92-1348]. Original and 3 copies. c/s: y. (pdw)
10/26/93	[716878] Appellant's motion to extend time to file petition for rehearing until 11/1/93 submitted to panel. (pdw)
10/29/93	[717775] Order filed by Judges Tacha, Barrett, Brown granting Appellant's motion to extend time to file petition for rehearing until 11/1/93. NO FURTHER EXTENSIONS WILL BE CONSIDERED [716067-1] Parties served by mail. (pdw)
11/1/93	[718191] Petition for rehearing in banc [92-1348] filed by Nicholas Brady, Steve Higgins. Original and 14 copies. c/s: y (fg)

DATE	PROCEEDINGS
11/1/93	[718193] Document [718191-1] Petition for rehearing in banc filed by Appellant Nicholas Brady, Steve Higgins submitted to panel. (fg)
11/3/93	[718933] FIRST notice of rules violation for Michael J. Singer for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
11/3/93	[718935] FIRST notice of rules violation for John S. Koppel for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
12/1/93	[724642] Order filed by Judge(s) McKay, Logan, Seymour, Moore, Enderson, Tacha, Baldock, Brordy, Ebel, Kelly, Barrett, Brown denying Petition for rehearing in banc [718191-1] (fg)
12/9/93	[727019] Mandate issued. Mandate receipt due 1/10/94 (mbm)
12/9/93	[727291] Mandate receipt filed. (afw)
2/1/94	[738546] Case file closed. 2/1/96 (bpm)
4/26/94	[761101] Petition for writ of certiorari filed on 4/15/94 by Appellant Nicholas Brady. Supreme Court Number 93-1631. (afw)
6/17/94	[774276] Supreme Court order dated 6/13/94 granting certiorari filed. (pdw)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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87-CV-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE UNITED STATES DEPARTMENT OF TREASURY; AND STEVE  
HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR BUREAU OF  
ALCOHOL, TOBACCO AND FIREARMS, DEFENDANTS

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COMPLAINT

[filed July 2, 1987]

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NATURE OF THE CASE

This is a constitutional challenge to certain provisions of the Federal Alcohol Administration Act, 27 U.S.C. §201, *et seq.* (hereinafter referred to as the "Act"), and to certain of its implementing regulations, insofar as they prohibit the Plaintiff from truthfully informing the public of the percentage alcohol content of fermented malt beverages on product labels and in product advertisements. This denial of Plaintiff's right to communicate accurate, independently verifiable, quantitative information on the percentage alcohol content of such beverages, and the denial of the public's right to receive such information from the Plaintiff, violates the First Amendment to the Constitution of the United States.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this matter under 28 U.S.C., § 1331 and 5 U.S.C., § 702.
2. Venue is proper in this Court under the provisions of 28 U.S.C., § 1391(e).

PARTIES

3. The Adolph Coors Company is a Colorado corporation engaged in the production, sale and distribution of fermented malt beverages throughout the United States, with its principal place of business in Jefferson County, Colorado.

4. James Baker, as Secretary of the United States Treasury, is charged with the administration of the Federal Alcohol Administration Act, 27 U.S.C., § 201, *et seq.*

5. Steven Higgins, as Director of the Bureau of Alcohol, Tobacco and Firearms (hereinafter the "Bureau"), performs his duties under the general direction of the Secretary of the Treasury, and is directly responsible for the administration of the Act.

GENERAL ALLEGATIONS

6. The First Amendment to United States Constitution gives the Plaintiff the right to truthfully inform the public of the percentage alcohol content of its products and other fermented malt beverages.

7. Under pertinent provisions of the Act, Plaintiff is prohibited by law from truthfully informing the public of the alcohol content of malt beverages. Specifically, 27 U.S.C., § 205(e)(2) prohibits statements of alcohol content on labels of malt beverages unless required by state law; and § 205(f)(2) prohibits statements in advertising of



alcohol content of malt beverages unless required by state law.

8. The provisions of the Act that prohibit Plaintiff from disseminating truthful information to the public concerning the alcohol content of malt beverages are severable from the balance of the Act pursuant to 27 U.S.C. § 211(c).

9. On or about April 15, 1987, Plaintiff submitted to the Bureau applications for label approval and print and broadcast advertisements for the purpose of truthfully informing the public of the percentage alcohol content of malt beverages. That Application is attached as Exhibit A and incorporated by reference herein.

10. Plaintiff's application was denied by the Bureau on or about May 4, 1987. The denial of Plaintiff's Application is attached as Exhibit B and incorporated by reference herein.

11. The Bureau's denial of Plaintiff's application constitutes final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C., § 701.

12. The Bureau refused to consider the Plaintiff's application on its merits solely because of the provisions of 27 U.S.C., § 205(e)(2) and § 205(f)(2), and implementing regulations.

13. The Bureau has previously stated in reports and testimony to Congress that public policy favors requiring public disclosure of the percentage alcohol content of malt beverages.

14. In the absence of the aforesaid prohibitions of the Act, Plaintiff would truthfully inform the public of the alcohol content of its products by stating the percentage alcohol content on product labels and in advertisements of malt beverages or, at the very least, would be entitled to have the Bureau consider the Plaintiff's label approval application on the merits.

15. The public, including the actual and potential consumers of the Plaintiff's products, have a First Amendment right to receive information on the percentage alcohol content of malt beverages and the Plaintiff desires to communicate this information.

16. The percentage alcohol content of the Plaintiff's products and other malt beverages is factual information that the actual and potential consumers of the Plaintiff's products want to know.

17. The prohibitions of the Act that prevent the Plaintiff from truthfully informing the public of the percentage alcohol content of malt beverages are not supported by a substantial government interest; nor are the prohibitions of the Act properly tailored to serve any government interest.

#### **FIRST CAUSE OF ACTION**

##### **Review Under the Administrative Procedure Act**

18. The allegations in paragraphs 1 through 17 are incorporated by reference as though fully set forth herein.

19. The Bureau's denial of the Plaintiff's application for approval of print and broadcast advertisements to truthfully inform the public of the numerical percentage alcohol content of malt beverages violates the First Amendment rights of the Plaintiff and the public and is, therefore, properly set aside by this Court under 5 U.S.C., § 706(2)(b).

#### **SECOND CAUSE OF ACTION**

##### **Declaratory Judgment**

20. There presently exists a legal case and controversy between the Plaintiff and the Defendants under 28 U.S.C. § 2201 in that:

(a) Plaintiff asserts its constitutional right to truthfully inform the public of the contents of malt beverages by stating the numerical percentage alcohol content of malt beverages on its product labels and in its product advertisements;

(b) Plaintiff asserts the constitutional right of the public, including the potential and actual consumers of the Plaintiff's products, to receive truthful information on the alcohol content of malt beverages;

(c) Pursuant to regulations issued by the Bureau, Plaintiff cannot exercise its constitutional right to inform the public of the alcohol content of its products without approval by the Bureau; and

(d) The Bureau has refused to approve label and advertisement applications submitted by Plaintiff on the sole ground that alcohol content labeling is prohibited by pertinent provisions of the Act.

21. The provisions of the Act which prohibit the Plaintiff from truthfully informing the public of the alcohol content of malt beverages are invalid under the First Amendment to the United States Constitution and this Court should so declare.

#### RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Hold unlawful and set aside the Defendants' decision refusing to process Plaintiff's application for approval of alcohol content labeling and advertising; and direct Defendants to process the Plaintiff's application on the merits;

B. Declare that the pertinent provisions of the Act that prohibit dissemination of truthful information to the public concerning the alcohol content of malt beverages

are unconstitutional on their face and as applied, insofar as they prohibit dissemination of truthful information to the public concerning numerical statements of the alcohol content of malt beverages on product labels and in advertisements;

C. Sever those provisions from the balance of the Act;

D. Permanently enjoin the Defendants from enforcing said provisions of the Act and its implementing regulations insofar as they prohibit dissemination of truthful information to the public concerning numerical statements of the percentage alcohol content of malt beverages on product labels and in advertisements; and

E. Such other and further relief as the Court deems appropriate, and in accordance with law, equity and good conscience.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY

\* \* \* \* \*

[Compl., Exhibit A, at p. 1]

[SEAL OMITTED]  
Adolph Coors Company

April 15, 1987

Ms. Vicki Rennecker  
Chief, Product Compliance Branch

Mr. Bruce L. Weininger  
Chief, Industry Control Division  
Bureau of Alcohol, Tobacco & Firearms  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20226

RE: REQUEST FOR APPROVAL OF PRINT AND  
BROADCAST ADVERTISEMENTS AND  
LABEL APPROVAL APPLICATIONS 87-4  
and 87-5

Dear Ms. Rennecker and Mr. Weininger:

We have become more and more convinced that there can be no meaningful public policy reason why alcohol content should not be designated on malt beverage labels and in advertising. We believe that the consuming public is badly served by prohibiting this practice as misconceptions arise as to the true alcohol content especially as compared to other products containing alcohol.

We are proposing the program represented by these items in order to provide consumers with this important information. Our intent is simply to inform. We make no claims in these ads regarding alcohol content as a product

benefit nor does our labeling draw undue attention to this statement. Our statements are nothing more than a presentation of facts we believe consumers should know. We hope the agency can consider the broader public policy implications of this issue rather than rely on an untested and time-worn statute.

These pieces are a program. We want you to consider them as a unit. Rejection of one is effectively rejection of all. Please forward your response to me at BC-540, Golden, CO 80401.

Thank you for considering our position on this issue.

Sincerely,

/s/ Timothy R. Gablehouse  
TIMOTHY R. GABLEHOUSE  
Managing Attorney  
Regulatory Affairs

TRG:rb

pc: Tom Carney, Bradley, Campbell & Carney  
Linda Christenson, Adolph Coors Company



DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL  
(See Instructions and Paperwork Reduction Act Notice on Back)

PART I - APPLICATION

FOR ATF USE ONLY		NAME AND ADDRESS AND PLANT REGISTRY NO. OR BASIC PRODUCT NO. OF APPLICANT	
1. VENDOR CODE (Required)		ADOLPH COORS COMPANY GOLDEN, COLORADO 80401	
2. SERIAL NO. (Required)		84-0178360	
3. BRAND NAME (Required)		Attn: Tim Gablehouse Mail No. BC540 Adolph Coors Company Golden, CO 80401	
4. CLASS AND TYPE (Required)		Beer	
5. PRINCIPAL NAME (If Any)		Type of Application (Check Applicable Box)	
6. VINTAGE (Wine Only)		<input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL	
7. FORMULA NO. (If Any)		<input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "FOR SALE IN _____ ONLY"	
8. LAB. ANALYSIS NO.		<input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL	
9. STATE ANY WORKED, NOT SHOWN ON LABELS (Copy, submit, etc.)		TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (If in ounces)	

PART II - APPLICANT'S CERTIFICATION

The applicant hereby declares under the penalties of perjury that to the best of his/her knowledge and belief all statements appearing in the above application are true and correct and the representations of the labels and in the supplemental documents truly and correctly represent the contents of the containers to which such labels will be applied. Additionally, the applicant for exemption from label approval further certifies that the product will be exclusively disposed of in the State shown in Item 4b, and that each container will bear the legend "For Sale in (State shown in Item 4b.) only".

13. DATE OF APPLICATION 04/02/87  
14. SIGNATURE OF APPLICANT AUTHORIZED AGENT *[Signature]* Vice President

PART III - ATF CERTIFICATE

This certificate is issued subject to applicable laws and regulations and conditions as set forth on the back of this form.

15. DATE ISSUED MAY 04 1987  
16. SIGNATURE OF DIRECTOR *[Signature]* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

QUALIFICATIONS

THIS APPROVAL IS GRANTED ONLY IF STATE REQUIREMENTS FOR LABELING OR A STATEMENT OF PUBLIC COMMENT IN THE FORM SHOWN ON THE LABEL BELOW.

APPROPRIATE COMPLETE SET OF LABELS BELOW



[Complaint, Exhibit A]

EXHIBIT A

Page 2 of 5 of page(s).

DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL  
(See Instructions and Paperwork Reduction Act Notice on Back)

PART I - APPLICATION

FOR ATF USE ONLY		NAME AND ADDRESS AND PLANT REGISTRY NO. OR BUREAU PERMIT NO. OF APPLICANT	
ID		ADOLPH COORS COMPANY GOLDEN, COLORADO 80401	
CT 711		84-0178360	
OR		AP	
1. VENDOR CODE (Required)	2. SERIAL NO. (Required)	Attn: Tim Gablehouse	
2018	87-5	Mail No. BC540	
3. BRAND NAME (Required)		Adolph Coors Company	
Coors Light		Golden, CO 80401	
4. CLASS AND TYPE (Required)		Beer	
5. FANCIER NAME (If Any)		4. TYPE OF APPLICATION (Check Applicable Box)	
6. VINTAGE (New Only)		<input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL	
7. AGE (Distilled Spirits)		<input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "FOR SALE IN _____ ONLY" (Fill in State abbreviation)	
8. FORMULA NO. (If Any)		<input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (Fill in amount)	
9. STATE ANY WORKING, NOT SHOWN ON LABELS (Cans, etc.)			

PART II - APPLICANT'S CERTIFICATION

The applicant hereby declares under the penalties of perjury that to the best of his/her knowledge and belief all statements appearing in the above application are true and correct and the representations of the labels and in the supplemental documents truly and correctly represent the contents of the containers to which such labels will be applied. Additionally, the applicant for exemption from label approval further certifies that the product will be exclusively disposed of in the State shown in Item 4b, and that each container will bear the legend "For Sale in (State shown in Item 4b.) only".

PART III - ATF CERTIFICATE

12. DATE OF APPLICATION  
04/02/87

13. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT  
*[Signature]*, Vice President

14. SIGNATURE OF SPECIAL AGENT IN CHARGE  
*[Signature]*

15. DATE ISSUED  
MAY 04 1987

16. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

FOR ATF USE ONLY

QUALIFICATIONS

THIS APPLICANT IS QUALIFIED TO APPLY IN THE STATE OF COLORADO FOR THE LABEL APPROVAL OF A CERTAIN TYPE OF GLASS CONTAINER IN THE FORM SHOWN ON THE LABEL BELOW.

APPROPRIATE COMPLETE SET OF LABELS BELOW



FCB

DATE: July, 1985

CLIENT: Adolph Coors Company  
PRODUCT: Coors Premium  
FILM NO.: YCPP5243  
FILM TITLE: "Bandwagon"

FILM LENGTH: :30

64



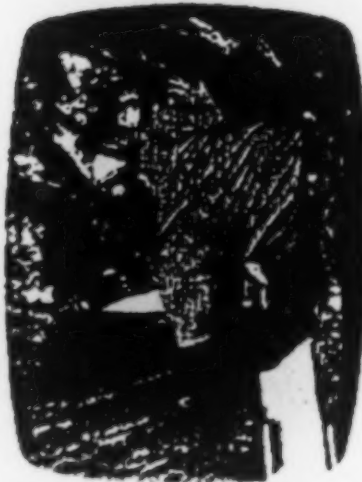
1. (NATURAL OUTDOOR SFX  
UP AND UNDER)



2. MARK HARMON: Y'know, I've  
been a beer drinker for a bunch of  
years.



3. And, like you, I've seen a lot of  
beer commercials.



4. But there's one beer people loved  
before it was even advertised.



5. Y'see, Coors was kind of the beer  
at my folks' place.



6. People thought it was different...  
special.



7. And that was true long before  
there were any jingles or promotions.



8. (SFX: POP)



9. It's the product people love, not  
the hoopla.



10. You think about that.



11. How many products can you  
say that about?



12. Coors is the one.

[Complaint, Exhibit A]

4 of 5 =



# COUNT ON COORS FOR THE FACTS

59



## BRAND ALCOHOL CONTENT BY VOLUME\*

Bud Light (108 calories)	3.56%
Coors Light	4.12%
Miller Lite	4.12%
Budweiser	4.67%
Coors	4.73%
Miller High Life	4.53%
Miller Genuine Draft	4.61%
Old Style	4.91%
Stroh's	4.31%
Michelob	4.78%
Herman Joseph's	4.75%
Heineken	4.97%
Corona	4.42%

\*Independent Laboratory Analysis

This message courtesy of the Adolph Coors Company  
© 1987 Adolph Coors Company, Golden, Colorado 80401 - Brewer of Fine Quality Beers Since 1873

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

---

CIVIL ACTION NO. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, SECRETARY OF THE TREASURY, AND  
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,  
TOBACCO AND FIREARMS, DEFENDANTS

---

[Filed July 31, 1992]

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AMENDED ANSWER

Defendants Nicholas Brady and Steven Higgins, through their undersigned counsel, file the following, amended, answer to plaintiff's Complaint:

Unnumbered Paragraph. The allegations set forth in the unnumbered paragraph of the Complaint entitled "Nature of the Case" contain conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

1. Admitted.
2. Admitted.
3. Admitted.
4. The allegations of paragraph 4 of the Complaint are admitted, except to deny that James Baker currently serves as Secretary of the United States Treasury. Nicholas Brady

currently serves as Secretary of the Treasury.

5. Admitted.

6. The allegations of paragraph 6 of the Complaint contain conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

7. Paragraph 7 of the Complaint contains plaintiff's characterizations of 27 U.S.C. § 205 and not averments of fact to which an answer is required and defendants respectfully refer the Court to that statute for a full statement of its contents.

8. Admitted.

9. Admitted that plaintiff submitted the applications referred to in this paragraph on or about April 15, 1987. Defendants are without knowledge sufficient to admit or deny the remainder of this paragraph.

10. Admitted.

11. Paragraph 11 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations of paragraph 11 are denied, except to admit that no further administrative action is required for plaintiff's application for label approval and that no formal administrative procedure exist for approval of advertising.

12. Denied, except to admit that plaintiff's applications were denied under 27 U.S.C. § 205(e)(2) and (f)(2).

13. Denied, except to admit that the Bureau of Alcohol, Tobacco and Firearms has previously stated that it favored allowing labeling which disclosed the alcoholic content of malt beverages.

14. Defendants are without sufficient information to admit or deny the allegations of this paragraph, except to admit that plaintiff applied for permission to use labels and advertisements containing statements regarding the

alcoholic content of their products and that the Bureau of Alcohol, Tobacco and Firearms considers all applications for compliance with legal requirements.

15. Paragraph 15 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied, except that defendants are without sufficient information to admit or deny the allegation that plaintiff "desires to communicate [alcohol content] information."

16. Defendants are without sufficient information to admit or deny the allegations of this paragraph, except to admit that the percentage of alcohol in malt beverages is factual information.

17. Paragraph 17 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

18. Defendants' answers to plaintiff's unnumbered paragraph entitled "Nature of the Case" and to paragraphs 1 through 17 are incorporated by reference.

19. Paragraph 19 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

20. Subparagraphs (a) and (b) of paragraph 20 contain plaintiff's characterization of this action and not averments of fact to which an answer is required. Subparagraph (c) contains plaintiff's characterization of the regulations contained in 27 C.F.R. Part 7, and defendants respectfully refer the Court to those regulations for a full statement of their contents. Subparagraph (d) is admitted.

21. Paragraph 21 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

The remainder of the Complaint contains plaintiff's characterization of the relief requested and not averments of fact to which an answer is required.

Respectfully submitted,

STUART M. GERSON  
Assistant Attorney General

MICHAEL J. NORTON  
United States Attorney

WILLIAM G. PHARO  
Assistant United States Attorney

/s/ \_\_\_\_\_  
SANDRA M. SCHRAIBMAN

/s/ \_\_\_\_\_  
PATRICIA M. RUSSOTTO

/s/ \_\_\_\_\_  
ROBIN S. ROSENBAUM

Department of Justice  
Civil Division  
901 E Street, N.W., Room 912  
Washington, D.C. 20530  
Telephone: (202) 514-4470  
Telecopier: (202) 616-8202

Attorneys for Defendants



## [GUNDEE DEPOSITION, EXHIBIT 1]

## AFFIDAVIT

HOWARD N. GUNDEE being duly sworn deposes and says as follows:

1. I am making this affidavit concerning a survey titled "Beverage Study" prepared for Bradley, Campbell & Carney which reports upon the results of interviews conducted by telephone with consumers in the United States and Canada during May and June, 1987.

2. I reside at 2636 Summit, Highland Park, Illinois and am Senior Vice-President and a Principal in C/J Research, Inc., a marketing research organization which conducts surveys dealing with a variety of subjects.

3. Prior to joining C/J Research, Inc. in March, 1985, I was employed by Elrick and Lavidge, Inc., one of the largest marketing research organizations in the country, at which company I served as a Project Director, and as Vice President and Account Supervisor.

4. I have a Bachelor of Business Administration degree from the University of Miami with a major in marketing and have worked in the marketing and research survey field since 1969.

5. During my employment, I have conducted and/or supervised hundreds of surveys, specializing in surveys of the type undertaken and reported on in this Affidavit.

6. I personally designed the survey reported upon in this Affidavit and supervised all phases of its conduct.

7. The survey was conducted utilizing professionally accepted methodologies for surveys of this type and is the type of survey routinely relied upon by marketing professionals for important business decisions. If this study were repeated one hundred times, 95 times out of 100 we would expect the results in each study to be within 5 percentage points of the results shown in the report.

8. To the best of my knowledge all statements made in the report of findings are true and accurate.

/s/ \_\_\_\_\_  
HOWARD N. GUNDEE

[Notary subscription omitted]

### RESEARCH PROCEDURE

In order to better understand the results, surveys were conducted in the U.S. and in Canada. Beer sold in Canada lists alcohol content. Therefore, by conducting studies in both countries, it is possible to investigate the differences, if any, in knowledge and attitudes attributable to alcohol content labeling.

For the United States portion of the study, a total of 500 interviews were conducted with consumers (250 women and 250 men) between May 12th and May 24th, 1987. The interviews were conducted via long distance telephone lines from a centrally monitored telephone interviewing facility using a national probability sample which included telephone numbers for the forty-eight contiguous states within the United States (excluding Alaska and Hawaii).

For the Canadian survey, a total of 500 interviews were conducted with consumers (250 women and 250 men) between June 16th and June 20th, 1987. The interviews were conducted at the same interviewing facility as the United States interviews. A probability sample was used which included telephone numbers for the following Canadian provinces: Alberta, British Columbia, Manitoba, Ontario, Saskatchewan, and Quebec.

The samples used in this study are random samples which are computer generated. Samples of this nature ensure that unlisted telephone numbers and recently issued numbers will be included in the interviewing process.

For each interview, the interviewers were instructed to speak with a male in the household who had the most recent birthday and who was of legal drinking age (for *that* particular state or province) or older, (Colorado and Canadian provinces—18 years, Ohio and Wyoming—19 years, all other states—21 years). If this person was unavailable, the interviewers were instructed to speak to a

female in the household who had the most recent birthday and was of legal drinking age or older. This further serves to randomize the interviewing procedure.

Because some areas of Canada are predominantly French, two specialists were trained to interview French-speaking respondents.

In order to participate, respondents had to meet a number of criteria. All respondents in the study were legal drinking age or older, and reported that they had consumed beer during the previous month.

People were excluded from participation if they were a member of a family or have a close friend who worked for an advertising agency, a marketing research firm, or a manufacturer, distributor, or retailer of beverage products.

Respondents who qualified for the study were asked, "You mentioned a moment ago that you have recently had beer to drink. What brand of beer do you drink most often?" If regular or light beer was not specified, the respondents were asked "Is that (*BRAND*) regular or light you drink most often?"

Next, the interviewers asked, "You mentioned that (*BRAND*) is the brand of beer you drink most often. Do you know the approximate percent alcohol content of this brand?" All consumers who responded "yes" to this question were further queried, "What is the approximate percent alcohol content of (*BRAND*)?" The response was recorded exactly as was stated by the respondent.

Following this, the interviewers prepared to read a list of beer brands by saying, "Now I will read the names of some brands of beer and would like you to tell me what is the approximate percent alcohol content for each brand. What is the approximate alcohol content of (*BRAND*)?" The list of beers about which United States respondents were questioned is as follows: Regular Budweiser, Miller

High Life, Regular Coors, Michelob, Heineken and Miller Lite.

The Canadian respondents were queried about the following list of beers: Labatt's Blue, Molson Canadian, O'Keefe Ale (Quebec province only) Old Vienna (All provinces except Quebec), Labatt's Blue Light and Molson Light. Of course, the order in which the beers were read was rotated to control order bias. If the brand of beer which the respondent stated he or she drinks most often was included in the brand list, the respondent was not asked about it again.

Once this was accomplished, the respondents were asked, "Do you yourself, feel that the alcohol content of beer should or should not be shown on the bottle or can?" They then were asked, "Why do you say that?" The response was recorded exactly as stated by the respondent.

Finally, all respondents who said that the alcohol content of beer should be shown on the bottle or can were asked, "Other than just curiosity, why would you want to know the alcohol content of the beer you drink?" Again, the response was recorded exactly as stated.

#### SUMMARY OF KEY FINDINGS

- As compared to beer drinkers in the United States, beer drinkers in Canada exhibit significantly greater levels of knowledge (both perceived and actual) about the approximate alcohol content of beer and the beers they drink most often.
  - In Canada more than seven out of ten beer drinkers (72.2%) claimed to know the alcohol content of the beers they drink most often. Less than one-third (31.1%) of the beer drinkers interviewed in the U.S. claimed this knowledge.

- Nearly seven out of ten beer drinkers in Canada (68.6%) actually knew the approximate content of the beer they drink most often while less than one in four (22.6%) U.S. beer drinkers were correct in their approximations. (NOTE: Responses ranging from 2% to 6% alcohol content have been counted as a correct approximation.)
- Among those beer drinkers in the U.S. and Canada claiming to know the approximate alcohol content of the beers they drink most, the proportions giving correct approximations are more comparable but still significantly higher among the beer drinkers in Canada (72.9% — U.S.; 95% — Canada).
- When questioned about brands of beer other than the brands they drink most often, similar findings were noted. In the U.S., approximately one-fourth (21.0% to 28.6%) of the respondents mentioned alcohol content levels considered correct. In Canada, the proportions of respondents mentioning levels considered correct range from 63.2% to 67.6%.
- More than eight out of ten respondents in both the U.S. and Canada (82.6% and 87% respectively) feel the alcohol content of beer should be shown on the bottle or can.
  - The primary reasons for wanting to know this information are similar in both countries and relate to a desire on the parts of many respondents to know what they are drinking. Other reasons mentioned include the use of this information to avoid drinking too much or to know when not to drive if they have had too much to drink.
- If these studies were repeated one hundred times, 95 times out of 100 we would expect the results in each study to be within 5 percentage points of these figures.



TABLE 1

Q.2a. YOU MENTIONED THAT (BRAND Q. 1A) IS THE BRAND OF BEER YOU DRINK MOST OFTEN. DO YOU KNOW THE APPROXIMATE ALCOHOL CONTENT OF THIS BRAND?

	UNITED STATES	CANADA
Total Number of Respondents	(500)	(500)
Yes	31.1%*	72.2%*
No	63.1	21.6
Don't Know/Not Sure	<u>5.8</u>	<u>6.2</u>
	100.0%	100.0%

\*ALCOHOL CONTENT SUMMARY (Q.2B)

— Among those respondents who said "yes" to Q.2A —

	UNITED STATES	CANADA
Less than 2%	1.3%	0.0%
2 to 6%	72.9	95.0%
Over 6%	25.2	5.0
Don't Know/Not sure	<u>0.6</u>	<u>—</u>
	100.0%	100.0%
BASE:	(155)	(361)

TABLE 2  
Q.2B/3 WHAT IS THE APPROXIMATE PERCENT ALCOHOL CONTENT OF (BRAND RESPONDENT DRINKS MOST OFTEN/BEGIN WITH X'D BRAND)?

	Less than 2 Percent	2 to 6 Percent	More than 6 Percent	Don't Know/Not Sure*	Number of Respondents
UNITED STATES					
Brand Consumed Most Often**	0.4%	22.6%	7.8%	69.2%	(500)
Regular Budweiser	1.0	26.8	13.6	58.6	(500)
Miller High Life	1.4	28.2	13.0	57.4	(500)
Regular Coors	1.2	27.6	13.2	58.0	(500)
Michelob	0.8	26.2	13.8	59.2	(500)
Heineken	0.8	21.0	16.0	62.2	(500)
Miller Lite	1.0	28.6	10.4	60.0	(500)
CANADA					
Brand Consumed Most Often***	0.0%	68.6%	3.6%	27.8%	(500)
Labatt's Blue	0.2	67.6	5.8	26.4	(500)
Molson Canadian	0.2	65.2	6.0	28.6	(500)

O'Keefe Ale/Old Vienna	0.4	63.2	3.8	32.6	(500)
Labatt's Blue Light	0.4	65.8	2.4	31.4	(500)
Molson Light	0.4	64.6	1.8	33.2	(500)

\* Includes respondents who said "No" or "Don't Know/Not Sure" when asked Q. 2A "You mentioned that (BRAND Q.1A) is the brand of beer you drink most often. Do you know the approximate percent alcohol of this brand?"

\*\* All "Most Often" brands are included in this row including: Regular Budweiser, Miller High Life, Regular Coors, Michelob, Heineken, and Miller Lite.

\*\*\* All "Most Often" brands are included in this row including: Labatt's Blue, Molson Canadian, O'Keefe Ale, Old Vienna, Labatt's Blue Light, and Molson Light.

TABLE 3

Q.4A. DO YOU, YOURSELF, FEEL THAT THE ALCOHOL CONTENT OF BEER SHOULD OR SHOULD NOT BE SHOWN ON THE BOTTLE OR CAN?

	UNITED STATES	CANADA
Total Number of Respondents	(500)	(500)
Should be shown	82.6%	87.0%
Should not be shown	3.2	1.8
Don't Know/Not Sure	14.2	11.2
	100.0%	100.0%

TABLE 4

Q.4B WHY DO YOU SAY THAT?\*

(By answer to Q. 4A)

	Should be Shown		Should Not Be Shown	
	USA (413)	CAN (435)	USA ( 16)	CAN ( 9)
TOTAL NUMBER OF RESPONDENTS				
AMOUNT OF ALCOHOL CONTENT AND DRINKING ISSUES - NET	59.6%	63.9%	6.3%	-
(Will/Would know what you are drinking; Will/Would know alcohol content you are drinking; Should know amount of alcohol/what you are drinking)				
INFORMATION ISSUES - NET	16.2	18.4	-	22.2
(For information purposes; other alcoholic beverages show content)				
CONSUMER CONCERNS - NET	5.6	9.0	-	-
(Drinking and driving mentions; health Mentions)				

80

DOESN'T MATTER/NOT INTERESTED  
NO PARTICULAR REASON - NET

OTHER - NET	1.7	0.7	43.8	33.3
Miscellaneous Mentions	1.7	0.9	18.8	22.2
Don't Know	9.9	6.2	25.0	11.1
	5.3	0.9	11.1	12.7

See appendix for additional detail

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TABLE 5

Q.4C OTHER THAN JUST CURIOSITY, WHY WOULD YOU WANT TO KNOW THE ALCOHOL CONTENT OF THE BEER YOU DRINK?

—ASKED AMONG THOSE RESPONDENTS WHO SAID THE ALCOHOL CONTENT OF BEER SHOULD BE SHOWN (Q. 4A)

	UNITED STATES	CANADA
NUMBER OF RESPONDENTS	(413)	(434)**
AMOUNT OF ALCOHOL — CON- TENT AND DRINKING ISSUES — NET)	39.7%	39.6%
(Will/Would know what you are drinking; Let people know how much they can drink; Would know alcohol content you are drinking)		
CONSUMER CONCERNS — NET	17.4	22.8
(Drinking and driving mentions; health mentions)		
DOESN'T MATTER/NOT IN- TERESTED/NO PARTICULAR REASON — NET	15.7	10.8
INFORMATION ISSUES — NET	11.4	11.5
(For information purposes; compare different beverages, brands; Would help in selecting the beer to drink)		

TABLE 5 — Continued

	UNITED STATES	CANADA
OTHER — NET	9.4	5.1
Miscellaneous Mentions	3.1	4.8
Don't Know	3.1	5.5

\* See appendix for additional detail.

\*\* One respondent refused to answer the question.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE U.S. DOT, ET AL., DEFENDANTS

Washington, D.C.  
Monday, June 1, 1992

\* \* \* \* \*

[5] P R O C E E D I N G S

Whereupon,

DANIEL R. BLACK,

business address at 650 Massachusetts Avenue, N.W.,  
Washington, D.C., was called as a witness by counsel for  
Plaintiff, and having been duly sworn by the Notary  
Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. OADE:

Q. This is the deposition of Mr. Dan Black, taken pursuant to Notice of Deposition under Rule 30 of the Federal Rules of Civil Procedure. The deposition may be used for any purpose permitted by Rule 32 of the Federal Rules.

I believe the witness has been sworn; is that correct?

A. That's correct.

\* \* \* \* \*

[6] Q. Are you familiar with the purpose of today's [7] deposition?

A. I believe I'm familiar with it.

Q. You understand that I represent the Adolph Coors Company in some litigation against the Bureau of Alcohol, Tobacco and Firearms?

A. I understand that.

Q. And I'm here to get some information from you to find out about your views and hopefully the views of the agency concerning the matters of controversy. Do you understand that?

A. I understand.

\* \* \* \* \*

Q. Okay. I would like to start just by getting an idea of your background; for example, how long you've been with the Bureau of Alcohol, Tobacco and Firearms?

A. I started in 1967. At that time we were the Internal Revenue Service.

Q. And what position did you start in the agency?

A. As an inspector.

Q. And what position do you hold?

[8] A. It's a dual position, deputy director and associate director for compliance operations.

Q. Who do you report to?

A. To the director.

Q. Mr. Higgins?

A. Steve Higgins.

Q. Are you in a policymaking function at the Bureau?

A. Yes, I am.

Q. Do you ever speak on behalf of the Bureau before Congress?

A. I have.

Q. Before committees of Congress?

A. Committees of Congress, that's correct.

Q. And are you familiar and do you have input into the agency's policies on its various regulatory functions with regard to alcohol regulation?

A. Yes, I do.

Q. How long have you held your current position?

A. I'm going to say—let me look up here. Since the 12th of June of '89.

Q. And that's your diploma on the wall that says [9] deputy director?

A. That's the one. There's the one for the other title.

Q. Okay. Is there a difference between deputy director and associate director for compliance?

A. It's the same position essentially. We have two deputy directors and they function with the director in formulating policy for the entire organization. Then the other title, associate director for compliance, handles just the compliance operations part of the organization.

Q. Okay. Now, if the agency received a complaint on alcohol labeling or advertising, would that come under your jurisdiction?

A. Yes, it would.

Q. And would that complaint ultimately come to your attention in some fashion?

A. Sometimes yes, sometimes not. Depends on whether it's resolved at a lower level.

\* \* \* \* \*

[10] Q. Since 1962 have you been involved in alcohol compliance and regulation here at the Bureau?

A. You said '62. I didn't start until '67.

Q. I'm sorry. '67. I misspoke.

A. And then the question was?

Q. Since that time, 1967, have your efforts at the Bureau and duties been primarily in the area of alcohol regulation and compliance with existing law?

A. That's correct, yes.

Q. So you have 25 years' experience in this field?

A. That's correct.

Q. And during those 25 years have you become familiar with the brewing industry?

A. I would say pretty familiar.

[11] Q. Would that include the brewing industry not just in the United States but also in Canada and throughout the world?

A. Certainly to a lesser extent in Canada or the rest of the world, just a very general knowledge.

Q. You are familiar, I would assume, with the existing laws and regulations that regulate alcohol content labeling and advertising?

A. I'm pretty familiar with it.

Q. And you're aware that the current federal law prohibits brewers from placing on their label any type of information concerning the alcohol content of the product, is that correct?

A. That's correct.

Q. And you're also familiar with the regulations by the Bureau that implement those laws, is that correct?

A. That's correct.

Q. And you're aware, I assume, that one of the purposes, in fact, the primary purpose of this lawsuit is to challenge those laws in certain particulars, is that correct?

A. That's correct.

[12] Q. And you have been at the Bureau since this litigation started, correct?

A. Yes.



Q. Would you agree, Mr. Black, that the current law prevents consumers from knowing the alcohol content of malt beverages?

A. Would I agree that it prevents consumers.

Q. Let me ask you a slightly different question. That's kind of a broad question, maybe a little unfair.

Are you aware that brewers in the United States on occasion get requests from consumers for the alcohol content of the products?

A. I'm sure they do, yes.

\* \* \* \* \*

[15] Q. Mr. Black, do you have information—does the [16] ATF have information on the alcohol content of individual beverages malt beverages?

A. No, we don't keep that information.

Q. So if an ordinary consumer called your agency and asked you for product information on alcohol content of individual brands of malt beverages, you would not be able to answer their question?

A. That's correct. We would not be able to.

\* \* \* \* \*

[24] Q. That's a fair statement, thank you. Consumers, because of the current state of the law, are not told generally the alcohol content information in malt beverages, are they?

A. That's fair, yes. In other words, there's a prohibition against advertising and labeling.

[25] Q. Yes. And if you can't get that information on the product label and you can't get it in advertising, how would the consumer get this information?

A. I couldn't tell you because I don't—I just don't see it happen that often. I don't know how they get it.

Q. During the course of this lawsuit I was contacted by a researcher of alcohol studies at Brown University who informed me, and I'm going to ask you a question about this, who informed me in kind of a joking manner that it was easier to get information on deep sea ocean temperatures than it was to get alcohol content information on malt beverages. Would you agree or disagree with that statement?

A. No way could I agree or disagree. I don't know anything about ocean temperatures.

Q. But certainly you would agree that alcohol content product information is not readily available to consumers in this country, is it?

A. I would say probably not readily available.

\* \* \* \* \*

[27] Q. Are you aware, Mr. Black, that Canada requires the labels in all ads of malt beverages to disclose the alcohol content of the product?

A. I've heard that. I'm assuming that that's probably a requirement.

Q. Has the ATF ever looked at the Canadian experience to determine what, in fact, that has had in Canada whether it be a positive effect or negative effect from a public policy standpoint?

A. No, not that I know of that.

Q. Are you aware generally, Mr. Black, that most western countries—I'm speaking of Europe and the European Community—require that consumers be informed of the alcohol content of malt beverages?

A. I'm aware of it.

[28] Q. Has the agency as a policy matter ever looked at the experience of other western countries to determine whether that requirement that consumers be told the

alcohol content of the product has negative or positive consequences from a public policy standpoint?

A. No, we've never looked into that.

Q. At one point there was some legislative action or proposed legislative action on requiring alcohol content disclosures on product labels of malt beverages. Are you aware of that?

A. No, I'm not specifically.

Q. I have a letter here that Mr. Higgins, not signed, but stamped, I assume the original is signed with a copy to you which describes some proposed legislation in Congress. I have a hard time reading the date of this letter. It's not a very good copy, and it's the only one I received in discovery. But it describes the proposed legislation, and then it has the ATF position on the second page. I'll ask you if you could take a look at that, and then I'll ask you some questions about it and maybe you could help me with the date.

A. '86.

\* \* \* \* \*

[29] Q. Okay. This July 1986 letter is to the director of the Office of Legislation and Regulations from the director of the Bureau of Alcohol, Tobacco and Firearms, is that correct?

A. That's correct.

Q. And the subject is legislative request on, it appears to be Senate Bill 2595, is that correct?

A. If that's what it says. S 2595.

Q. S 2595?

A. Yes.

Q. Does that refer to a number of a senate bill?

A. I believe that's the case.

[30] Q. It says on the second page, and I'll quote, ATF supports the disclosure in both the labeling and advertising

of malt beverages of their alcohol content period. However, comma, we would recommend, comma, in view of certain technical considerations, comma, that Section 10 of the bill will be revised, period, close quote. Do you see that?

A. I see that.

Q. Is that an accurate statement of the position of the ATF in July of 1986?

A. I can't disagree with that.

Q. Okay. So as of July 1986, the ATF did support the disclosure in both the labeling and advertising of malt beverages of the alcohol content?

A. That's correct.

Q. And is that the agency's position today, if you know?

A. If that was our position, then I'm going to say that's still our position today. If, in fact, a request was made to us as to proposed legislation, we wouldn't be opposed to it.

\* \* \* \* \*

[31] Q. Are you aware that current regulations prohibit both descriptive statements concerning the alcohol content of malt beverages and also purely factual information on the percentage of alcohol in the product, is that correct?

A. That's correct.

Q. Okay. Are you aware, Mr. Black, that the regulations challenged by Coors in this lawsuit pertain only to the prohibitions of giving consumers factual information on the alcohol content of the product stated in numerical terms subject to appropriate regulations by [32] the Bureau of Alcohol, Tobacco and Firearms?

A. That's my general understanding.

Q. Okay. You understand that this litigation does not challenge in any way the agency's ability or the law's

ability to regulate descriptive statements of alcohol content that tout the alcohol content of the product; do you understand that?

A. That's my general understanding, yes.

Q. Is that a significant distinction in your mind as a government regulator?

A. That's hard to say. You know—

Q. Well, let me ask you another question. Could the Bureau of Alcohol, Tobacco and Firearms regulate advertising that tout the alcohol strength of the product; could that be regulated while at the same time information be given to consumers concerning the percentage of alcohol content?

A. If the legislation was specific enough to allow that regulation to be put into effect, yes, we could do that.

\* \* \* \* \*

[36] Q. Okay. As a matter of public policy, do you find anything objectionable about giving consumers that [37] information in this ad?

A. Well, only to the extent that it's prohibited as a matter of public policy. We're obligated to follow the FAA Act, both the legislation and the regulation, so I really can't say.

Q. Okay. Would the same be true of disclosing that type of alcohol content information on the label, a simple statement, contains 4.6 percent alcohol by volume; do you find anything objectionable as from an enforcement standpoint?

A. Well, only to the extent that it's prohibited.

Q. Okay. Let's talk about enforcement for a moment, Mr. Black. There have been a number of enforcement actions by your agency directed against brewers that have tried to market the alcohol content of their product, is that correct?

A. There have been a few.

Q. Okay. And the ones that come to mind are the, quote, Powermaster, unquote, ads that I believe dealt with—do you recall what brewer that was?

A. Heilman.

Q. Heilman?

[38] A. Right.

Q. And then there's the St. Ides, I-d-e-s, ad. What was that about? Do you recall that?

A. St. Ides is a malt liquor that is brewed by Heilman under contract from, I forget the name of the company, some small wholesaler, I believe. The St. Ides case involved a variety of things, but one of the things was that they advertised that it's number 1 strong.

\* \* \* \* \*

[39] Q. Isn't it true, Mr. Black, that in regulating against attempts to market malt beverages based on alcohol content through such statements as Powermaster or strong or lightning, that the agency uses the regulations that prohibit such descriptive statements referring to alcohol content?

[40] A. That's correct.

Q. Okay. The agency has not relied upon the separate part of the regulation that prohibits the disclosure of alcohol content information through the use of simple numbers?

A. I'm not sure I understand the question.

\* \* \* \* \*

Q. Let me hand you a copy of 27-CFR, and I'll refer you specifically to 27-CFR.29 (F) and (G) which I have highlighted for you.

A. Which you're in part 7 so it's 27-CFR 7, correct, 7.29?



MS. RUSSOTTO: 7.29.

MR. OADE: Yes, that's correct, 7.29 (F) and (G).

\* \* \* \* \*

[41] Q. Have you reviewed those two separate subsections (F) and (G)?

A. I just did.

Q. Okay. Let me ask you a question. Subsection F 7.29, Subsection F, prohibits the use of descriptive words that refer to alcohol content. It says, quote, Likely to be considered as statements of alcoholic content, unquote, correct?

A. Correct.

Q. That would include the Powermaster compliance effort by the Bureau, correct?

A. Correct.

Q. That would include any attempt by a brewer to market their product based on alcohol strength by saying strong or dynamite or lightning or any type of those words, is that correct?

A. That's correct.

Q. Then you have a separate regulation, 7.29 (G), that deals not with descriptive words that tout alcohol content, but with disclosures through the use of [42] numericals like 4.6 percent alcohol by volume, correct?

A. That would be the way I would interpret that section of the regulations.

\* \* \* \* \*

[43] THE WITNESS: Let me try to clarify something here. I'll give you our interpretation, that both (F) and (G) really apply to something other than purely putting the alcohol content down in the form of numerals. When you talk about (G), what we're saying there is—that you can't put down 4.5 percent alcohol. We know that. But you

couldn't also put it on there in another fashion. You get my point? What it's also saying in there is you can't also try to put it on there in some other way like a character or figure or —

Q. Roman numeral?

A. Right. If you can't put it on legally, 4.5, you can't try to somehow disguise it, and both of those really mean the same thing, so you couldn't say if the court struck this down and left this, that's not sufficient in my opinion to allow you to still put alcohol content. This was just another section to keep brewers from finding a way around putting alcohol content on it.

[44] Q. All right. So would it be a fair statement to say in drafting these regulations the ATF is regulating both against direct disclosures of alcohol content and indirect disclosures of alcohol content?

A. That's correct.

Q. Okay. And certainly the agency would be capable in the regulatory setting of distinguishing between direct product disclosures on the one hand and indirect product disclosures on the other hand that tout the alcohol content of the product?

A. I would say yes.

\* \* \* \* \*

[47] Q. In 1989 the agency saw the need to publish regulations concerning low-alcohol malt beverages, correct?

A. Correct.

Q. Do you recall what that particular need was?

A. As I recall, the concern was attempting to clarify for consumers' products that were totally alcohol-free versus those that had trace amounts of alcohol.

Q. Okay. I think that's correct. And let me show you a letter from an attorney to your agency dated December 17,

1987 concerning a consumer who suffered personal injuries as a result of ingesting, quote, [48] alcohol-free beer, unquote, that, in fact, had alcohol in it, and ask you if you recall that and similar types of incidents?

A. Okay. I'm familiar with this. Your question about similar incidents?

Q. Yes. What happened here apparently with this consumer by the name of Ignacio Castako, I-g-n-a-c-i-o, C-a-s-t-a-k-o. Apparently he was an alcoholic who picked up a bottle of beer labeled alcohol-free assuming that it didn't have any alcoholic in it, correct?

A. I'm not sure.

Q. Is he saying alcohol-free or no alcohol?

A. Okay. No—okay, alcohol-free.

Q. And the consumer, according to that letter, if it said alcohol-free, assumed it was no alcohol?

A. Right.

Q. That wasn't true, was it?

A. Evidently not.

\* \* \* \* \*

[49] Q. Okay. The consumer was confused because it said alcohol-free, and that wasn't true, correct?

A. Correct.

Q. All right. I have another letter here from Mr. Frank Annunzio, A-n-n-u-n-z-i-o, member of Congress, who was contacted subsequently by Mr. Greg Lonis, L-o-n-i-s, and he writes your agency indicating that that consumer is confused over the term nonalcoholic. Do you recall getting that letter? And I will also hand you a copy of the agency's response.

A. Okay.

Q. My question is were those the type of concerns that led the agency to see the need for some type of regulation in the area of low alcohol or nonalcoholic malt beverages?

[50] A. Yes, that's correct.

Q. Okay. Apparently what was happening is brewers were putting things like nonalcoholic on their product and consumers didn't know what that meant, correct?

A. Right.

Q. And they were putting alcohol-free on their product, and consumers didn't know what that meant, correct?

A. Right.

Q. Would you agree, Mr. Black, that the problem with the low alcohol could have also been resolved by simply disclosing a percentage of alcohol content of the product?

MS. RUSSOTTO: I object. I think that calls for speculation. You can answer the question.

THE WITNESS: That could be. I don't know. It's hard to say.

BY MR. OADE:

Q. Okay. Would you agree that there's two types of information consumers could receive about the product; one is descriptive terms such as nonalcoholic or strong, and the other is factual information concerning the [51] actual alcohol content by volume?

A. Yes.

Q. Those are two types of information?

A. Sure.

\* \* \* \* \*

Q. Now, when the agency was responding to the need for alcohol product information in the low-alcohol beers or malt beverages, the agency chose to go with descriptive words rather than a statement percentagewise of the alcohol content by volume, correct?

[52] A. No, I don't believe that's the correct way to state that. The descriptive terms were already there. And

the agency chose to avoid further misleading information by clarifying the descriptive terms.

Q. By defining them?

A. We defined them.

Q. By saying nonalcoholic means less than .5 percent alcohol, correct?

A. Correct.

Q. Is that information placed on the label?

A. That is, yes.

Q. Okay. So now a consumer who picks up a bottle of malt beverage labeled, quote, nonalcoholic won't be misled because they know it contains less than .5 percent alcohol, correct?

A. Right.

Q. So in order to avoid misleading the consumer the agency deemed it appropriate to give that consumer information about the alcohol content expressed as a percentage of alcohol by volume, correct?

A. I'm not — no, I don't believe that's the case.

Q. Well, how did you do it?

[53] A. We defined essentially what the descriptive statements meant.

Q. Well, according to your regulation, 7.6 I agree you defined what the statement meant and the way you defined is by reference to the percentage of alcohol by volume?

A. Yes.

Q. Okay. So the agency apparently believes that expressing the alcohol content of the product through a percentage of alcohol by volume gives the consumer reasonably accurate information far more accurate than simply a descriptive term such as nonalcoholic, correct?

A. Only as it refers to nonalcoholic or the alcohol-free?

Q. Correct.

A. Right.

\* \* \* \* \*

[54] MR. OADE: I will read into the record definitions of the entire section from 37 CFR 7.26 on alcoholic content.

(A) The alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by state law. When alcoholic content is required to be stated that the manner of statement is not specified in the state law, it shall be stated in percentage of alcohol by weight or by volume and not by proof or any maximums or minimums, otherwise in the manner of statement shall be specified in the state law.

(B) The terms, quote, low alcohol, unquote, or, [55] quote, reduced alcohol, unquote, may be used only on malt beverage products containing less than 2.6 percent alcohol by volume.

(C) The term, quote, nonalcoholic, unquote, may be used on malt beverage products provided the statement, quote, contains less than 0.5 percent alcohol by volume, unquote, appears in direct conjunction with it and readily legible printing and on a completely contrasting background.

(D) The term, quote, alcohol-free, unquote, may be used only on malt beverage products containing no alcohol, period, unquote.

Are you familiar with those regulations?

A. I am now.

Q. Isn't it fair to say that if you're going to give the consumer descriptive words on the alcohol content of the product in order to avoid misleading the consumer, you also have to give them specific information on the percentage of alcohol content by weight or volume?

A. Well, not necessarily. I think those regulations will



say that if it's alcohol-free it has no alcohol. I don't think that specifically states on there [56] it contains zero percent alcohol.

Q. Okay. But I think alcohol-free is certainly descriptive enough that a consumer is warranted in believing there's zero alcohol in there, correct?

A. That was the intent of the regulation.

Q. But one consumer thought that nonalcoholic meant alcohol-free, and that's not the case, is that correct?

A. That's correct.

Q. So if you're going to give consumers two types of information, generally the most accurate information is to state the percentage of alcohol content of the product, is that correct?

A. That's fair to say.

Q. Is there any reason why the agency would not have the ability to regulate the disclosure of alcohol content information on malt beverages expressed as a percentage of alcohol by volume?

A. I'm not sure what you're saying.

Q. Well, let me be more specific. Apparently the agency in the low-alcohol content context believes that brewers are capable of producing a product that [57] contains .5 percent alcohol or less on a fairly consistent basis, correct?

A. Well, yes, that's true.

Q. And that giving consumers that information is giving them information that the agency considers to be reliable information?

A. That's correct.

Q. Okay.

A. But all labels essentially should be reliable or they can't use them.

Q. Now, if the law allowed a brewer to put alcohol

content information on the label expressed as a percentage by volume, would the agency able to publish appropriate regulations that would prevent consumers from being misled, if you know?

A. I think so, yes.

Q. In other words, getting back to the Coors ad that was proposed here where it was going to be a simple statement that said contains 4.6 alcohol percentage of alcohol by volume, there's nothing inherently misleading about that, is there?

A. Not if it's correct. We do the same for [58] spirits and wine.

Q. Sure. And it would be done for malt beverages, couldn't it?

A. Right.

Q. Have you ever heard the argument made, Mr. Black, that giving consumers accurate information on the alcohol content of malt beverages expressed as a simple percentage of alcohol by volume would result in brewers marketing their product based on appeals to alcohol content?

A. I've heard a variety of those arguments.

Q. Okay. Isn't it true that in the agency's experience the marketing of malt beverages based on those type of appeals to alcohol strength is generally done through descriptive words that do not give accurate product information?

A. I'm not sure what you're referring to.

Q. Well, strong, full strength, Powermaster, light, in this case, dynamite?

A. Well, for the most part those terms are prohibited so we don't allow that.

Q. But it happens, doesn't it?

[59] A. It can happen.

Q. Is it frequent or infrequent?

A. Very infrequent.

Q. So as a general matter, brewers do not attempt to market malt beverages based on alcohol strength?

A. No, because they're prohibited from doing so.

Q. All right. But you've said even though they are prohibited, in isolated instances brewers do attempt to do that?

A. Take Powermaster, since you brought that up before. The regulation says that the term strong strength, full strength, extra strong, etcetera, is prohibited. The term power may or may not mean that, so here you're talking about whether or not one person's meaning of the word essentially means strong or strength.

\* \* \* \* \*

[60] A. The brewer's own internal document said get the new up-strength beer to compete with some others. And when they in their own wording said this is an up-strength product, then we immediately said, okay, now you've told us what Powermaster means, and that's why we took the action we did.

Q. Okay. I understand. So if I understand your [61] comments correctly — and let me be more specific, that the Powermaster problem as expressed by community groups, this was being marketed to minorities in the inner city, I believe, is that correct?

A. That's correct.

\* \* \* \* \*

[62] Q. Okay. We've already talked, Mr. Black, about the agency's position with respect to disclosure of product information in the statement that the ATF supports the disclosure in both the labeling and advertising of malt beverages of their alcohol content. Do you recall that?

A. I recall it.

Q. Now, when you say the ATF supports the dis-

closure in labeling and advertising of their alcohol content, is the agency referring to the disclosure of accurate information on the alcohol content expressed as a percentage by volume or weight?

A. I believe that's what the intent of that proposed legislation was.

[63] Q. It was not the intent of the agency to approve of disclosure of product alcohol content by saying it's strong or anything of that nature, correct?

A. That's the way I understand that, yes.

\* \* \* \* \*

[64] Q. Let me be specific. You're aware that there are now warning labels on products with alcohol in them, including malt beverages, correct?

A. Fully aware of that.

Q. Fully aware. And the warning labels inform the consumer that there are side effects to the alcohol content of the product, correct?

A. No, they don't refer to alcohol content.

Q. All right. Bad question. The warning labels inform consumers that there is alcohol in the product and that the alcohol in the product has side effects, it can affect the unborn, for example?

A. I think you're partially correct. I don't believe the warning label really says anything about alcohol content. It more or less refers to the assumption of this product could cause these health problems.

Q. Okay. But the assumption of this product that could cause those health products, the particular component of the product that we're talking about is alcohol?

A. That's correct.

\* \* \* \* \*

[65] Q. Certainly if you're going to warn consumers



about products with alcohol in them, it makes sense to also tell them how much alcohol is in the product, doesn't it?

MS. RUSSOTTO: I object. Are you asking again for—

MR. OADE: His opinion. His opinion based on 25 years regulating this industry.

[66] THE WITNESS: Let's just say that's a sensible position.

BY MR. OADE:

Q. Okay. And you would agree with that position based on your experience regulating the malt beverage industry?

A. That's true.

\* \* \* \* \*

[70] Q. You're aware that certainly states do disclose the content of the product like, for example, Minnesota and some other states, is that correct?

A. That's correct.

Q. In what manner do these states disclose the alcohol content to consumers?

A. On the label in a variety of different places. They put it on the label.

Q. Is it expressed by a percentage of alcohol by volume?

[71] A. I'm not sure if it's volume or weight, but to us that's essentially immaterial as long as it's not misleading.

Q. Okay. And it's the agency's position that generally, in your experience, states that have disclosed the alcohol content of the product expressed as percentage by weight or volume that generally that has not been misleading?

A. That's correct.

Q. Have those states, where the alcohol content of the product is disclosed in that fashion have those states

experienced, if you know, any marketing of the product based on alcohol strength associated with that disclosure?

A. I'm not aware of any.

\* \* \* \* \*

[72] Q. Okay. I asked you previously about Canada and other western countries. I think you said that you were aware that Canada requires disclosure of the alcohol content expressed as a percentage by volume, is that correct?

A. I may have said that. I'm not sure whether it's by volume or weight, but I believe they do.

[73] Q. And you're aware it's required, not just permitted?

A. Right.

Q. And if you have a can of malt beverage in Canada, it says right on the label the alcohol content percentage, correct?

A. I believe it does.

\* \* \* \* \*

[75] Q. Is there a definition of light beers as far as the agency is concerned?

A. Not in general, no. We have requirements, though, that if the beer is labeled as light that they have to show a statement of calories, carbohydrates, some other things. In other words, we have a requirement if you're going to say your beer is light, you've got to put certain information on there that you don't have to put on if you don't put that light label on it.

Q. I see. So whenever you have some kind of descriptive statement such as light, you want accurate product information to be associated with that statement and give it some meaning?

A. Right.

[76] Q. Okay. And it's your testimony and belief that



calories and alcohol have some type of correlation, is that correct?

A. Well, we know that alcohol can be high in calories and there is a direct correlation between the lower calorie beers and lesser alcohol.

Q. Could a brewer put light on a beer, just call it light, when, in fact, it was at the upper end of the calorie-alcohol scale containing 4.6 or 4.9 percent alcohol?

A. Yes.

Q. A brewer could do that?

A. Yes.

Q. And a consumer might believe that that was not only a low calorie beer but a low alcohol beer as well?

A. I can't say what's in the mind of the consumer. But remember, if it's a light beer and it's labeled as light, the calorie content has to be on there so a consumer makes an informed choice by comparing that beer with another beer.

Q. Let me ask you this. How would a consumer faced with a beer labeled light even with a calorie [77] disclosure compare that to another beer that has no product information on it either with regards to calories or with regards to alcohol?

A. How would they make a decision?

Q. Yes.

A. I have no idea.

Q. So while you're giving the consumer some information about the calorie content of light beer, they really don't have any basis for comparing that calorie information to the regular beer, do they?

A. No.

Q. So it would be—it would be preferable to give the consumer as much product information as possible, wouldn't it?

A. You could probably say it's preferable, but again, there is no overwhelming consumer demand made on the part of the government to give them that information. So in other words, it's not a big issue to most beer consumers.

Q. As far as you know?

A. As far as we know. But we don't get—we get very few requests why don't you come out and tell us more [78] about the beer we drink.

Q. I've gone through the discovery file and I counted a number of such requests labeled—I thought at least four or five within the last several years, is that a small number in your judgment?

A. If four or five over the last several years a minute number. It's when you get a couple of hundred in a couple of months, then you've got a problem.

\* \* \* \* \*

[79] Q. These letters that you have from consumers or Congressmen appear to be spontaneous. I have here a letter dated March 2, 1990, a John J. Mitchell, Jr. writes to a congressman which was forwarded to your office, and I'll just read you the letter. This is a letter to his congressman.

Dear Bob, In these times of, quote, truth in labeling, unquote, and every warning imaginable on products of all types and varieties, I find it a strange paradox there is no indication of the percentage of [80] alcohol content on beer, ale, stout or other malt beverages. Recently warnings that alcohol can be harmful, etcetera, are appearing, but no percentages.

Consumers have the right to know how much alcohol they are consuming, and there is nothing on the labels of malt beverages that discloses this information.

Legislation now in existence which might present or prohibit such disclosure on packaging should be swept away and the new laws passed requiring that alcohol content

of beer ale, stout and other malt beverages be clearly printed on all labels. Such legislation is long overdue. Very truly yours, John J. Mitchell, Jr.

I might be accused of writing this letter, but I can assure you I didn't. And it came to the attention of your office through the congressman, apparently a spontaneous letter from a consumer of the product. Is that correct as far as you know?

A. Could be.

\* \* \* \* \*

[83] Q. We talked about Powermaster and St. Ides, which were, I guess, viewed as assessments by this agency to tout the alcohol content of the product. Do you recall those discussions?

A. Yes.

[84] Q. What other brewers in this country have, in your experience, the agencies experience attempted to market malt beverages based on appeals to alcohol content besides the Powermaster incidents in the St. Ides?

A. I believe Old English 800, which is a malt liquor put out by Pabst had some point of sale advertisements out in Spanish that essentially said, I believe it says the strongest or something of that nature. There may have been another one. I'm not familiar. But the whole issue came to light essentially with Powermaster and that the malt liquors point of sale advertisement tended to tout it based on strength.

Q. So you can think of basically four incidents where malt beverages were marketed based on appeals to alcohol strength?

A. Powermaster, St. Ides, the Old English 800. There may have been another one, but I'm —

Q. Possibly five then?

A. Four or five.

Q. Four or five in the last how many years?

A. Couple of years.

Q. Can you think of any prior to that?

[85] A. No, I can't specifically. I believe that our label people have said there were some potential labels they may have rejected, but I couldn't tell you what they are.

Q. So in your experience we've named the four or five you can think of?

A. Right.

Q. None of those by major brewers?

A. Well, depends on how you define major brewer.

Q. But none by Miller or Anheuser Busch or Coors?

A. Not that I can think of. Not that I can think of. One of those malt liquors could have been a Miller, but I'm not sure. I'm just — I just can't tell you for sure.

MR. OADE: That's all the questions I have.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO

No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, SECRETARY OF TREASURY,  
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,  
TOBACCO AND FIREARMS, DEFENDANTS

The Deposition of MICHAEL C. PORTER, taken before me, Carl M. DePerro, CSR-4284, Notary Public in and for the County of Wayne, State of Michigan, at 300 River Place, Detroit, Michigan, on Monday, July 20, 1992.

APPEARANCES:

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(By K. Preston Oade, Jr., Esq.),

Appearing on behalf of the Plaintiff

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Washington, D.C. 20530

Appearing on behalf of the Defendants

\* \* \* \* \*

[8] Q. What position do you hold here at Stroh's?

A. I am the Vice President of Marketing.

Q. And what responsibilities does that job entail?

A. Well, I am the senior marketing official of the company. So I oversee the department that develops the marketing plans for all of our beer brands domestically, that is, and oversees the execution of all of those plans and programs.

\* \* \* \* \*

[47] EXAMINATION BY MR. OADE:

Q. First I would like to ask you some general questions about Stroh Exhibit Two.

My first question is, Stroh Exhibit Two, is that a marketing study per se? I am talking about the Awareness, Attitude, and Usage Tracking Study, Stroh Exhibit Two.

A. It is a document that is developed under the oversight of our market Research Department, if that answers your question.

Q. It says it's an Awareness, Attitude, and Usage Tracking Study. I think that speaks for itself, but could you explain what that is? Why would you track consumer attitudes?

A. A tracking study is a study that is done periodically, hopefully at regular intervals over time because what is being measured there in not absolute percentages or absolute awareness, but rather how those things change over time.

We are simply tracking how our products and certain competitive brands are viewed by [48] the consumer, how they are used by the consumer and how the consumer feels about those products in broad terms and how all of those measures are changing over time.

Q. Now, you were asked some questions about the characteristics, what you called relevant product characteristics.



Just looking at the survey are these characteristics that from prior consumer surveys Stroh is aware that consumers have in their minds when they think about the product?

A. I would say yes.

Q. And those four characteristics are taste, quality, strength and brand overall; is that correct?

A. Yes.

\* \* \* \* \*

Q. That's what you mean by relevant product [49] characteristic?

A. Yes. And, of course, all malt liquors don't taste the same.

Q. So when we talk about these four relevant product characteristics, taste, quality, strength and brand overall, are we talking about malt liquors in general or are we talking about the particular Stroh product that's being surveyed here?

A. We are talking about malt liquors in general.

\* \* \* \* \*

[50] Q. Now, when you are talking about strength what are you talking about?

A. You are talking about taste impact, if you will, or the fullness of body of the product, as well as the alcohol content.

Q. So strength relates not just to alcohol content, but to fullness?

A. Yes.

Q. Could that also be called bite?

A. Yeah. I suppose the brewers have a whole bunch of things they could call it, but yeah.

Q. Now, according to the correspondence here in Exhibits Four and Five between the ATF and Stroh the ATF

took the position that in referring to or marketing Red Bull with the name "The Real Power!" or "More Power To You!" that that violated pertinent regulations because it [51] referred to the alcohol content of the product. Is that your understanding?

A. That's what this document says, yes.

Q. And apparently, according to Stroh Exhibit Five Stroh withdrew any commercials referring to the word strength or power; is that correct?

A. Yes, it is.

Q. I want to talk for a moment about alcohol content, beer and other malt beverages, if I may.

Are you aware of the fact that in the United States brewers are prohibited from disclosing to consumers the alcohol content of beer and malt beverages?

A. Yes, I am.

Q. Now, you have been in marketing for how many years?

A. In the sum of my career?

Q. The sum of your career.

A. About twelve.

Q. And how many of those twelve years has dealt with the beer and malt beverage industry?

A. Eight.

Q. Do you know if it cost more for a brewer to produce a higher alcohol product?

A. No, I don't think I could say definitively.

Q. Are you aware generally of other countries, Western [52] countries, including Canada, Australia and the United Kingdom, of how alcohol content disclosures are made to consumers in those countries or whether they are in fact made?

A. I know that in Canada alcohol content is disclosed on the label. I don't know about the other countries.

\* \* \* \* \*

Q. Does Stroh sell beer in Canada?

A. Yes, we do.

\* \* \* \* \*

[53] Q. My question was just dealing with the marketing of the product. What I am trying to find out is, I am trying [54] to find out if the fact that alcohol content disclosures are required by law in Canada has caused Stroh to in any way change the marketing of its product in Canada based on that singular fact.

A. I would say no, it has not.

\* \* \* \* \*

[55] Just for the record, we have marked as Stroh Exhibit Seven an example of an Old Milwaukee can that it's my understanding is sold in Canada.

BY MR. OADE:

Q. Is that correct?

A. Yes.

MR. OADE: Can we have a stipulation that this is what it purports to be?

MS. ROSENBAUM: Absolutely.

MR. OADE: Thank you.

\* \* \* \* \*

[56] Q. Now, you indicated that you are not responsible for marketing in Canada, but are you generally familiar with how Stroh is marketed in Canada?

A. I have some general familiarity, yes.

Q. Are you aware of a single instance in the years you have been working at Stroh where there's been a difference in marketing approach in the Canadian market as opposed to the American market simply because [57] alcohol content disclosures are required in Canada?

A. I am not aware of any instance like that.

Q. In your experience—well, does Stroh sell a higher

alcohol product in Canada than they do in the United States, if you know?

A. A higher alcohol product?

Q. Yes.

A. For example, is Old Milwaukee higher alcohol in Canada versus the U.S.?

Q. Yes.

A. I don't believe it is.

Q. Are you aware of the Stroh Brewery Company or any brewer, any American brewer that sells beer in Canada actually increasing the strength of its product because alcohol content disclosures are required in Canada?

A. I have never heard of such a thing, no.

Q. Do you as a marketing professional have an opinion as to whether if alcohol content disclosures were to be required by law in this country or permitted by law whether that would cause brewers to market their product based on alcohol content to increase the overall strength of the product?

A. I don't feel comfortable speaking for the industry. I would say that I cannot imagine that we would do that.

[58] Q. When you say we, you mean Stroh?

A. Meaning Stroh.

Q. And why is that?

A. I just don't think that that's a responsible way of doing business, nor do I think that it is necessarily a relevant or significant piece of information to be imparted.

Q. You mean to market your product?

A. Yes, to market the product, yes.

Q. Are you aware generally as to what the trend in this country is with respect to malt beverages as a whole? And I say the trend, whether the trend is toward the higher alcohol, high calorie end of the market, such as malt liquors, or whether the trend is towards the light beer,



lower alcohol products?

A. Light beer products and nonalcohol malt beverage products are growing at a faster rate than the industry in total.

Q. Do you have an opinion as to why that is so?

A. I think there is an increasing awareness of the need for moderation. There is increasing concern for being overweight, and in general, there is just general healthy attitudes which are contributing to that trend.

Q. Now as a consumer of beer if I am concerned about how many drinks I can have to drive a car, for example, or [59] how many malt beverages I can drink say of malt liquor or a light or regular beer, how do I get that information?

A. I don't think that there is a way, not readily anyway.

Q. If I was concerned as a consumer about the alcohol contents of the product and I wanted to drink a lower alcohol content and I went on the shelf and looked at the light beers, do I have any confidence or how confident can I be if I select a light beer that it means that's actually a lower alcohol beer?

A. I don't know that consumers even know that light beer is lower alcohol than regular beer, if you will.

There is generally a perception that light beer is lower in calorie count but I don't think they really know that they are lower in alcohol.

Q. Just because a beer has light does that necessarily mean it's lower in alcohol?

A. You would be better off asking a brewing person. But I don't think—I think that the removal of the alcohol is a primary contribution to the lower caloric count. But a brewer could provide you a more expert answer.

\* \* \* \* \*

[63] THE WITNESS: I think there is a perception that the reference to power includes references to alcohol content. I think that that is not a wholly incomplete perception. I think that there probably is some linkage there.

The growth that Old English 800 has experienced, in my opinion, and I think that's what's being asked for, my marketing opinion.

MR. OADE: Yes.

THE WITNESS: Is not wholly related to alcohol strength. My opinion is that Old English 800's growth as referenced in this document on usage and as we have read about in various trade journals is also attributable to the fact that over this period of time the product became far more affordable, if you will. There was widespread evidence that Olde English dropped their prices significantly in large parts of the United States, which made it cheaper relative to other malt liquors and relative to beer in total.

So I think that presents a more [64] complete picture.

BY MR. OADE:

Q. In your experience in marketing malt beverages, have you ever become aware of a product that was marketed primarily based on alcohol strength, in your opinion?

A. That's a tough question to answer.

I think that there probably have been some products which relied more on the usage, or certainly—yes, to answer your question.

Q. St. Ides, for example?

A. Yes. That's the example that came to my mind. So, yes.

Q. I think everybody in the industry is pretty aware of St. Ides, aren't they?

A. Yes.



Q. Would you consider that to be typical advertising in this industry or atypical advertising?

A. Atypical, thank heaven.

\* \* \* \* \*

[68] BY MS. ROSENBAUM:

Q. Just so we are clear exactly what your position is with regard to Stroh's, you are the domestic marketing vice president; is that correct?

A. That's correct.

Q. Earlier you said that there is a general perception that light beer is lower in calories but not alcohol. Do you remember when you said that?

[69] A. Actually, what I said was, or if that is what I said that's not exactly the way I meant to say it.

Q. Okay.

A. There is generally a perception or an awareness that light beer has less calories than regular beer. I don't think that there is a great deal of awareness of the difference in alcohol between regular and light beer.

Q. So it's your impression that people generally think that light beer and regular beer have the same alcohol content relatively speaking?

A. I would say that there is a lot of confusion about it, yeah.

Q. When you say confusion, do you mean just nonawareness or do you mean something else?

A. I would say yeah, nonawareness and incorrect information. I am not sure how much they really stop and think about it, I guess is maybe the best way to put it.

\* \* \* \* \*

[71] RE-EXAMINATION BY MR. OADE:

Q. You said you are domestic marketing manager. Do you also in the course of your job have any responsibilities

that touch upon or that involve how Stroh may be marketed in Canada or other countries?

A. That's not exactly a yes or no question.

Q. Why don't you explain?

\* \* \* \* \*

[72] Q. Why don't you explain that?

A. I sit on the company's technical policy committee, which is a group of senior managers that actually discuss product development from a technical sense. I am one of the approvals for as Mr. Walker alluded earlier what we call our P.M.I.C. process, which is the process by which proposals for new brands, new products, product rollouts and so forth are approved and enacted by the company.

Q. That would include Canada as well as the United States?

A. Yes. That would include Canada as well as the United States.

\* \* \* \* \*

Q. Do you have a degree in marketing?

A. I have a bachelor of business administration from the University of Michigan and an MBA from the University of Detroit. At Michigan my concentration was in marketing.

[73] Q. Do you consider yourself an expert in marketing, in the field of marketing?

A. Well, I have been able to convince Peter of that. That's on the record.

Q. You are talking about Peter Stroh?

A. Yes. I would consider myself an expert in marketing.

Q. Generally, and in the beer industry in particular?

A. Yes.

MR. OADE: That's all I have. Thank you very much.

\* \* \* \* \*

[1] UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO

No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, SECRETARY OF TREASURY,  
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,  
TOBACCO AND FIREARMS, DEFENDANTS

The Deposition of GEOFFREY S. WALKER, taken before me, Carl M. DePerro, CSR-4284, Notary Public in and for the County of Wayne, State of Michigan, at 300 River Place, Detroit, Michigan, on Monday, July 20, 1992.

APPEARANCES:

BRADLEY, CAMPBELL, CARNEY & MADSEN  
1717 Washington Avenue  
Golden, Colorado 80401

(By K. Preston Oade, Jr., Esq.),

Appearing on behalf of the Plaintiff

ROBIN S. ROSENBAUM, Attorney at Law  
U.S. Department of Justice—Civil Division  
Room 932

901 E Street, N.W.

Washington, D.C. 20530

Appearing on behalf of the Defendants

\* \* \* \* \*

[4] G-E-O-F-F-R-E-Y S. W-A-L-K-E-R was thereupon called as a witness herein, after having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. OADE:

MR. OADE: Let the record reflect this is the continued deposition of the Stroh Brewery Company and we have just sworn Mr. Geoff Walker, who is with legal counsel here.

Q. I will just ask you briefly to state your name and position, if you would, please?

A. My name is Geoffrey, with a G, S. Walker. I am currently Assistant General Counsel and Assistant Secretary of the Stroh Brewery Company.

Q. And Mr. Walker, how long have you been with Stroh?

A. Since March of 1985.

Q. And how long have you been practicing law?

A. I was sworn in to the District of Columbia Bar in December 1976.

Q. And where did you graduate from law school?

A. Cornell.

[5] Q. How long have you been a legal counsel in the brewing industry?

A. Since March 1985.

Q. And as legal counsel in the brewing industry do you have any role to play with respect to approval of product labels?

A. Since 1989 I have been supervising and actively involved in our entire regulatory approval process, which includes product labels.

Q. Would that include product labels both in the United States and in Canada?

A. That's correct.

Q. Are you aware of the alcohol disclosure clause in Canada?

A. Generally, yes, but I am not an expert.

Q. Would you state your understanding of the laws?

A. My understanding is the alcohol content has to be on the label. I believe it's alcohol by volume, as opposed to by weight, and that there are disclosures that are required in Canadian advertising in both print and media advertising, the television media advertising which displays the alcohol content of the product.

Q. Have you ever seen Canadian ads on television?

A. Yes.

Q. Where do you live?

[6] A. I live in Southfield, Michigan.

Q. And in Southfield, Michigan and here in Detroit do you get Canadian television?

A. Yes.

Q. And have you ever seen an ad for Canadian malt beverages on Canadian television?

A. Yes.

Q. How do they handle the alcohol content disclosure?

A. I have seen it where there have been—in fact I remember a Coors Light commercial which, whether that's Molson or LaBatts, which makes that product, I believe it's Molson, and there was a similar to the disclaimer required of the P.M.I.C. In many cases there is an information line at the bottom of the screen which states what the alcohol is by volume. I am not sure the consumer can read that, but it's in the advertising.

Q. And it's also on the label of every bottle of beer?

A. That's correct.

Q. You have seen and I believe you produced Stroh

Exhibit Seven, which I believe is an example of how labels are used in Canada to disclose alcohol contents.

A. What Stroh Exhibit Seven is is a copy of what we call a blank, which is a facsimile of what our Old Milwaukee cans will look like flat, and it has all the required [7] mandatory information. And this is a document that in the review process, our approval process, we have at Stroh which I would see and have to approve before it would be approved for use.

Q. In Canada?

A. In Canada, that's correct.

Q. Now, I would also like to hand you Stroh Exhibit Four, which is a letter to Mr. O'Shea of the Stroh Brewing Company to Terry L. Cates of the Compliance Division of the ATF.

Are you familiar with that document?

A. Yes, I am.

Q. And that document sets forth certain regulations dealing with alcohol marketing practices; is that correct?

A. That's correct.

Q. I would like to direct your attention to the following statement that refers to the regulations and I will quote.

"The regulation at 27 C.F.R. Section 7.54(c) specifically states that malt beverage advertisements shall not contain the words 'strong,' 'high test,' or any similar words or statements likely to be considered as statements of alcohol content, [8] except where required by State law."

Do you see that?

A. Yes, I do.

Q. Was it the position of the ATF that Stroh ads for Red Bull that referred to it's the power or the real power violated that section?

A. I believe that was their opinion. I am drawing that



conclusion based on the letter and conversation which took place.

\* \* \* \* \*

Q. As a result of discussions with the ATF did Stroh subsequently stop using those phrases?

A. Yes, we did.

Q. Now, are you aware—

A. By those phrases you mean the real power and more power to you?

\* \* \* \* \*

[12] Q. I want you to assume for a moment that the lawsuit here between Coors and the ATF seeks to strike down a particular provision of the Federal Alcohol Administration Act which prohibits brewers from giving truthful information to consumers about alcohol content, but does not seek to in any way disturb the [13] regulation at 27 C.F.R. Section 754 (c). And I would like to ask you if in your opinion the ATF would have been able to have obtained the same result with respect to the ATF's complaint about it's the power or the real power, if Coors—if the section of the law that Coors challenges had not been in effect.

MS. ROSENBAUM: Objection. Calls for speculation.

BY MR. OADE:

Q. Do you understand my question?

A. I believe so, and I believe ATF would have sufficient enforcement power under Section 754(c) to take action against advertising that it deemed in appropriate as it related to the provisions of that section which talk about prohibiting advertising using the words strong, high test or similar words likely to be considered statements of alcohol content.

\* \* \* \* \*

[14] Q. Of the Canadians—has there been to your knowledge any appeals to high alcohol strength in Canada or brewers marketing their product in Canada based on alcohol strength as a result of the mandatory disclosure of alcohol content?

A. I am not an expert on Canadian marketing practices. However, I have not seen in the commercials or in the context of reviewing materials in connection with either a dumping of litigation or our 301 petition, which would indicate that brewers in Canada are marketing [15] their products for hyping the alcohol content of the products.

MR. OADE: That's all I have.

\* \* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO

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No. 87-Z-977

COORS, PLAINTIFF

v.

BAKER, ET AL., DEFENDANTS

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The deposition of HUBERT ALPHONSE NELSON, called by the defendant for examination, pursuant to notice and pursuant to the Rules of Civil Procedure for the United States District Courts, taken before Doreen L. Boersma, CSR and Notary Public in and for the County of Cook and State of Illinois, on August 24, 1992, at 9:30 a.m., at Suite 329, 77 West Jackson Boulevard, Chicago, Illinois.

\* \* \* \* \*

[6] Q. What was your former position at Heileman, or if you had more than one, if you could describe each of them, please.

A. Sure. I was director of marketing for the malt liquor division, and I was there approximately four and a half years in that capacity.

Q. What were your responsibilities as the director of marketing for the malt liquor division?

A. I was responsible for the marketing activity for all the malt liquor brands, whether that be advertising, promotion, positioning, creating of new products, anything

that dealt with the malt liquor division.

\* \* \* \* \*

[10] Q. Is there a particular market that you have found through your experience with Heileman that drinks malt liquors?

A. Yes.

Q. And how would you describe that market?

A. Very easily. The malt liquor typical consumer is a man, 21 to 35—I'm giving you the prime drinking profile—urban dweller, some high school education, modest work, typically blue collar, not a very high economic pay level, city dweller, urban, black or Hispanic. That's your typical profile of a malt liquor drinker today.

Q. Is there a dominant category motivation for why a person would buy malt liquor as opposed to another type of beverage?

A. Yes. In my opinion the two things that dominate it are taste and strength of the product, alcohol strength. In many of the focus groups that I have participated in, the dominant phrase is "more high for the buy."

Q. What does that mean?

A. You get more alcohol strength from a malt liquor than you do from a beer. A beer product normally is 3.7 to 3.9 percent alcohol. Malt liquor [11] is slightly higher, 4.0. The leading malt liquors today are 4.5 to 5.5, and some are 5.9 percent alcohol.

\* \* \* \* \*

[32] Q. Now, would you agree that—I think you [33] did say earlier that St. Ides and Olde English were marketing their products on the basis of strength in part? I think you said, for example, that St. Ides had a sticker that said "No. 1 Strongest Malt Liquor"?

A. Absolutely.

Q. So you would agree, then, that they were marketing their product on the basis of strength?

A. Yes, they were.

Q. And since their sales were increasing so rapidly, you would agree, then, that that marketing tactic was working?

A. Absolutely. And the Justice Department had done nothing to stop them, so we presumed that it was all legal. And the same things with Olde English 800 and their No. 1 slogan in both print, advertising, radio, and billboards, "It's the Power." They had been saying it for years, therefore it was approved by the BATF and nothing was done, so we assumed that that was quite appropriate.

\* \* \* \* \*

[123] Q. Would you agree with the statement in this paragraph that says, "We ourselves have placed more importance on communicating the distinction of the high alcohol aspect of this brand as different from other malt liquor products"?

A. Yes. Keep in mind this is a letter from Della, Femina, the advertising agency, and the research director, Mary Hall, stating it. The "we" refers to Della and what they were trying to do on this project for Heileman. Yes, I would agree with that.

Q. And did you agree that this was a good tactic?

A. Yes, I would agree with that.

\* \* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

NICHOLAS BRADY, SECRETARY OF THE TREASURY; AND  
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,  
TOBACCO AND FIREARMS (BATF), DEFENDANTS

PRETRIAL ORDER

Plaintiff, Adolph Coors Company, and Defendants, Nicholas Brady, Secretary of the Treasury, and Steven Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), jointly submit the following proposed pretrial order:

I. DATE AND APPEARANCE

The pretrial conference in the above-captioned matter is set for Friday, September 11, 1992. K. Preston Oade, Jr., Esq., will appear on behalf of Plaintiff and Patricia M. Russotto, Esq., will appear on behalf of Defendants.

II. JURISDICTION

Jurisdiction in this matter is predicated upon 28 U.S.C. § 1331 and is not contested.

III. CLAIMS AND DEFENSES

This matter is before the district court for very specific factual determinations related to the constitutionality of



27 U.S.C. § § 205(e) and (f), pursuant to the opinion of the United States Court of Appeals for the Tenth Circuit filed on September 23, 1992. These statutory provisions generally prohibit "statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages" in both the labeling and advertising of malt beverages. The Tenth Circuit, applying *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) already has concluded that the disclosure of accurate alcohol content information is "within the ambit of First Amendment protection." In addition, the Tenth Circuit has determined that the government has a legitimate interest in preventing "strength wars" among brewers. However, the Tenth Circuit remanded the case for factual determinations on the questions of "whether the federal regulation of alcohol content advertising directly advances the government's asserted interest in preventing strength wars, and whether the complete prohibition of such advertising results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it."

It is Coors' position that permitting disclosures to consumers of the percentage alcohol content of the product in labels and advertising will not cause alcohol strength wars. In fact, other western countries disclose such information and alcohol strength wars have not resulted. In other countries requiring alcohol content disclosures to consumers, any danger of marketing the product based on appeals to alcohol strength have been effectively controlled through marketing codes that prohibit such practices. The ability of other countries to legislate directly against the asserted fear of alcohol strength wars demonstrates a lack of "reasonable fit" between the legislature's goal and the means chosen to reach it.

Coors does not challenge the government's right to regulate marketing practices to effectively inhibit brewers from engaging in alcohol strength wars. Coors wishes only to disclose to consumers the percentage alcohol content of its products and does *not* challenge existing law and regulations that prohibit descriptive statements of alcohol content (such as "strongest" or "boldest" as provided in 27 C.F.R. § 7.31(f). Coors challenges the existing law and regulations only to the extent that they suppress publication of accurate information to consumers concerning the alcohol content of the product (prohibited by 27 C.F.R. § 7.31(g). The manner of disclosing accurate alcohol content information to consumers can and should be regulated by the ATF to ensure uniform practices and prevent brewers from using this information to market the product based on appeals to alcohol strength.

It is Defendants' position that a present-day, factual showing is not necessary to establish that strength wars will result and that the means chosen by Congress to address that concern are no more restrictive than necessary to prevent strength wars from occurring. Instead, evidence that was before Congress in 1934, when the statute was enacted, is sufficient. In any event, Defendants argue that, in the absence of the statute at issue, a significant number of beer consumers will rely upon alcohol content information—whether used in marketing, upon labels, or both—to make purchasing and consumption decisions regarding malt beverages. A significant number of those consumers will use the information to select beers with higher alcohol content. Absent the statutory provisions at issue, brewers will increase the alcohol content of their beers to compete with each other for those consumers. The up-strength malt liquor industry, which comprises only about two percent of the total market for malt beverages, already has tried to compete for market share on the basis of strength, but the

statute allowed Defendants to take enforcement action to stop such competition.

#### IV. STIPULATIONS

The parties have entered into no stipulations as of the date of this filing. However, the parties expect to enter into a stipulation regarding the use of alcohol content-based advertising by the McKenzie River Brewing Company. The parties also expect to stipulate to the vast majority of trial exhibits.

#### V. PENDING MOTIONS

No motions are pending as of the date of this filing. However, the current deadline for filing dispositive motions is September 21, 1992, and Defendants reserve the right to file a motion for summary judgment on or before that date.

In addition, Defendants will move for a continuance of the trial date as a result of Plaintiff's identification on September 8, 1992, of two additional experts it wishes to use at trial.

#### VI. WITNESSES

Defendants intend to rely upon the witnesses listed below at trial. However, Defendants advise that this list is not final in light of Plaintiff's identification on September 8, 1992, of two additional expert witnesses it wishes to call at trial. Defendant, therefore, expressly reserves the right to identify additional witnesses, including expert witnesses, who may be called at trial.

##### *Nonexpert Witnesses:*

- A. Terry Cates, former Chief, Industry Compliance Division, ATF. Mr. Cates will testify regarding

ATF enforcement actions taken pursuant to the statute at issue. Will be present at trial.

- B. Lutz Issleib, Chairman of the Board, Pabst Brewing Company. Mr. Issleib will testify, via deposition, regarding Pabst's competitive response if statements of alcohol content are permitted in beer labeling and advertising.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

vs.

JAMES BAKER, SECRETARY OF THE TREASURY AND  
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,  
TOBACCO AND FIREARMS, DEFENDANTS

DEPOSITION

The following is the deposition of TIM AMBLER, taken before Maureen B. Gregory, RPR, pursuant to Notice of Taking Deposition, at Radisson Plaza Hotel, 85 South 7th Street, Minneapolis, Minnesota, commencing at approximately 9:00 A.M., September 21, 1992.

APPEARANCES:

On Behalf of the Plaintiff:

K. Preston Oade, Jr., Esquire  
Bradley, Campbell, Carney & Madsen  
1717 Washington Avenue  
Golden, Colorado 80401

On Behalf of the Defendants:

Robin S. Rosenbaum, Esquire  
Trial Attorney  
U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
Room 932  
901 E Street NW  
Washington, D.C. 20530

\* \* \* \* \*

[4] PROCEEDINGS

(Whereupon, the deposition of TIM AMBLER was commenced at 9:00 A.M. as follows:)

(Witness sworn.)

TIM AMBLER,

called as a witness, being first duly sworn, was examined and testified as follows:

\* \* \*

EXAMINATION

MR. OADE: This is the deposition of Timothy Felix John Ambler, A-m-b-l-e-r, taken pursuant to Notice under Rule 30 of the Federal Rules of Civil Procedure. It's been the understanding of the parties that this deposition will be used for purposes of trial testimony. Mr. Ambler has come in from London, England to provide his evidence in the case.

BY MR. OADE:

Q. I'd like to start by getting your present address if I might, please, and your current position.

A. My office or home address?

Q. Office.

A. It's London Business School, Sussex Place, London NW1 4SA.

[5] Q. And do you hold a current position with the London School of Business?

A. I'm a senior research fellow at the London Business School.

Q. And in what subjects do you specialize at the London School of Business?

A. I study—well, I specialize in international marketing, the way marketing managers work. And I teach the global marketing course at the school.



MR. OADE: I would like to mark as the first exhibit in this case a copy of your curriculum vitae with the attached expert report and appendix. I'll ask the court reporter to mark that as Exhibit 1, please.

(Whereupon, Deposition Exhibit No. 1 was marked for identification, and a copy is attached and hereby made a part of this deposition.)

BY MR. OADE:

Q. I'm going to hand you what has been marked as Deposition Exhibit 1. And I'll ask you to identify that for the record, if you would.

A. That is my opinion.

Q. And do the first two pages of your opinion summarize your qualifications and [6] experience?

A. Yes. I hope so.

Q. And who wrote Deposition Exhibit 1?

A. I did.

Q. There's also an attachment to Exhibit 1. Would you identify that, please.

A. Well, the attachment is an extract from the Code of Advertising Practice of United Kingdom. And it's Section C.XII which is the bit that deals with advertisement for alcoholic drinks.

Q. With respect to advertisements for alcoholic drinks, have you done anything or been consulted in connection with the regulation of advertising for alcoholic drinks in the United Kingdom?

A. Yes. In about the mid-70's I took part in the first ever drafting of this code that's attached. About—I can't remember to be precise, but about five years later than that we reworked it because one or two people had relatively minor complaints about one or two things. And I chaired the group that re-edited it at that time.

And it was subject to a further set of [7] changes, again

they were all minor, about five years after that. And although I wasn't on the committee, one of the people who answered to me was on the committee. And I worked with the committee indirectly on those changes at that time.

Q. Does Deposition Exhibit 1 accurately set forth your qualifications and experience on the first two pages, I believe?

A. Well, it's on the first page. And then there's a CV attached on the back of this, which comes just before the appendix.

Q. And does that accurately, the CV and the first page, accurately set forth your qualifications and experience?

A. Yes. I mean, it's a single page. But all I put on that was the factors I felt to be relevant.

Since writing that, there are, I think there's one area of experience which I didn't put on which I think is relevant, which is my experience in the United States. But you may wish to ask me about that later.

\* \* \* \* \*

[9] Q. When did you get your degree in marketing at the Massachusetts Institute of Technology?

A. 1969.

Q. And have you been engaged in marketing in the marketing field since that time?

A. Yes.

Q. And what brings you to Minneapolis today?

A. Well, I'm teaching a marketing course to some senior marketing people.

Q. Do you also have experience in the social issues involving alcohol and alcohol abuse?

A. Yes. My interest in that started about that time in the mid-70's about the same time as this Code of Practice and drawn up. And it became obvious to us at that time

that an alcoholic [10] drinks company has to take a responsible attitude to the use of its product.

That wasn't a new thought. I'm sure they had that thought a hundred years ago. But it was a new thought in the sense of actually getting out and meeting people to work in this sort of area and doing something about it rather than just sort of thinking about it.

I joined at about that time the Social Aspects Committee of the Wine and Spirits Association. And subsequently became Chairman of it for, again I'm not sure of the precise time, three or four years. And I was on that committee for about 10 years.

And that committee worked with the equivalent groups of the Brewers Society and the Scotch Whiskey Association and government groups and people in the sort of—I'm not quite sure what way to describe them accurately. But you know, who are interested in social effects but are not part of the industry. And obviously during that time I spent quite a lot of time and involvement in that.

Most recently I gave an address at the European Parliament about this subject. That was [11] last October. Looking at the various ways of dealing with alcohol abuse. Of which the two main strands are control theories and education.

Q. Now, in this particular case you have been asked to testify concerning the disclosures of other countries with respect to the alcohol content of alcoholic products; is that correct?

A. That's correct.

Q. Are you familiar with how other countries handle the regulation of alcohol product advertising and alcohol content disclosure?

A. In broad terms I'm reasonably familiar with that.

Not obviously with every country in every detail. And I've also specifically inquired, following your asking me, for the regulations on the particular matter of disclosure of content, alcoholic content.

Q. And I would like to—first of all, does your report summarize the provisions of various countries with respect to alcohol content disclosure?

A. Yes. In sections 2.1 and 2.2.

Q. Have you had a chance to review your expert report prior to this deposition?

A. Yes.

\* \* \* \* \*

[13] Q. All right. Thank you. Now, would you [14] just summarize very briefly the experience of the United Kingdom with informing consumers about the alcohol content of malt beverages and beer. Let's start with what is the current practice and how long has that been done?

A. The current practice is to—declare the strength as a percentage alcohol by volume. And next spring that will also be the base for taxation. And so they're consistent. The authorities like to have them the same and they can use the same enforcement.

Prior to that—and that's quite a new development. That's only within the last year or two. Prior to that, the brewers were required to express the strength of beer in bands by original gravity. And that in turn wasn't a very long-lasting piece of legislation. That was only brought in about maybe ten years ago.

And prior to that there was no declaration.

Q. Now, in making the current disclosure of percent alcohol by volume in the United Kingdom, how is that disclosure made?

In other words, is it placed on the label or is it in ads or exactly how is it done?



[15] A. It has to be on the packaging but it doesn't have to be on advertising. And I don't think I've ever seen it on advertising.

Q. When it is put on the packaging how is it done; is it just placed on there as part of the ingredients?

A. It's placed—obviously different manufacturers put it in different places. It has to be mandatory minimum size so that it's easily seen by the consumer. And it is usually put with the—not with the ingredients because ingredients don't have to be stated on beer. But in that sort of little panel of factory information. There's an E number for the size. It's usually put, for example, with the size and the content.

Q. Let's turn to the European community. Does the European community currently disclose the alcohol content of malt beverages to consumers?

A. Yes. This United Kingdom disclosure is in fact an EC piece of legislation rather than a UK piece.

Q. What are the EC countries that you're referring to?

A. There's twelve. In addition to the [16] United Kingdom there's Ireland, Portugal, Spain, France, Luxembourg, Belgium, Holland, Germany, Denmark, Greece. How many have I got up to?

Q. I think that covers it. Now, in these EC countries, you say this has been in effect for approximately year and a half, two years?

A. That's all.

Q. Were there any alcohol disclosure laws in any of these countries prior to that?

A. Yes. And it was variable. And I cannot, I'm afraid, tell you exactly what each had. And it's quite complicated. But they used different measures. But some were using alcohol by volume, for example France did.

Q. Are you also familiar with the regulatory laws in

the country of Australia with respect to disclosures of alcohol content on malt beverages?

A. Yes. That is the same as in the EC. So in addition to the EC there's Australia, Canada, New Zealand, Norway and Japan. All of which needs alcohol by volume.

Q. Now, in Australia, how long has Australia disclosed the alcohol content of malt beverages to consumers, if you know?

A. Well, they followed the same pattern as [17] United Kingdom broadly. Because of course, they came from the same cultural base. If one wishes to accuse Australia of culture. And again, I have to be careful here because I'm not knowledgeable about Australia, per se.

But there has been a tremendous interest in Australia in light beer, much lighter than here. Down about 2 percent. And Swan Light which came from Perth in western Australia is given the credit by some people—I don't know how factually true this is. I mean, it's certainly true that it's a first in light beers. But it is also believed by some people that that caused an interest in putting the strength on the cans so that the consumer could see what they were getting.

Q. How long has Canada had alcohol content disclosure laws, if you know?

A. I don't know.

Q. We've seen some information or actually there's been exhibits in this case that indicate that Canada has had disclosures law since 1976. Could you comment on that?

A. That sounds quite likely. I mean, my experience of Canada has largely been in the wine [18] and spirit area. Gilbert Canada Company is about the second or third largest wine and spirit company in Canada. And I had responsibility for that.

So I'm reasonably familiar with the Canadian market-



place. But I don't have direct beer familiarity with Canada.

Q. Now, have you been asked to determine whether these alcohol content disclosure laws have resulted in any evidence of brewers raising the alcohol content of their product for marketing purposes or any other purpose after these alcohol disclosure laws took effect?

A. There has been—and obviously one has to distinguish between marginal changes in order to round up to a whole number or to a number which the brewer thinks is attractive, and any changes of significance one way or another.

So for example, that if a brewer was previously on 4.1 or 3.9 they may well have rounded the number to four because it looked tidier on a can once you had to put it on a can.

There is no evidence in the public arena about that. Because obviously by definition the previous precise strengths were not known.

[19] I think the drift of your question is, is there any significant shift upwards in order to, as it were, form a competitive advantage. And the answer to that is no.

Q. And how do you know that the answer to that question is no?

A. Well, because in the UK, as in many other countries, there is quite a body of people who are not friendly to the alcoholic drinks industry and believe that the drinks industry is responsible for a lot of the alcohol abuse problems. And that forms a very significant lobby which, as I said, in the UK has been particularly strident since the mid-70's. So I'm not trying to take sides on this issue. It's a fact.

And therefore, whenever the alcoholic drinks industry does something which it considers wrong, one can count

on them to make quite a lot of noise about it. I read the newspapers. I see the media in the UK. And there hasn't been that noise.

Furthermore, we set up, again about 10 years ago, an organization called The Center for Information on Beverage Alcohol. Which is a worldwide data base for information about these [20] kinds of issues, about social issues of alcohol, scientific advances, all the problems of alcohol abuse and so on. And that is based in London. But as I say, it gets its information from all over the world.

And once a month it sends out to its subscribers a summary of news in the specialist area. And as I was one of the group that set that up, I've been getting their monthly summaries ever since. Occupies a full shelf on my book case. And that would pick up that kind of problem.

Q. And did you review that data base in connection with this case?

A. Indeed I did. That's where I got quite a lot of this information from.

\* \* \* \* \*

[21] Q. Are you familiar with the range of various malt beverages that are sold in the United Kingdom and the European community? And when I say range, I'm talking about the range of the product with respect to alcohol content from the lowest alcohol content to the highest.

A. I'm more familiar with the range in the UK than with Europe as a whole. But yes, I would say that I had a fair familiarity with the range of beer which is sold.

Q. What are the—is there some way to describe the range of products, malt beverages, with respect to alcohol content in the United Kingdom or elsewhere?

A. Well, as I said in my document, they range roughly from 3 percent—if you ignore the relatively new, very low alcohol beers. But if you look at beer as beer, it ranges

from a low of about 3 percent to a high which is under 9 percent in the mainstream.

As I say in my document, there are, particularly in northern France and in Belgium, some beers which are more stronger than that. They're a tiny market. And in eastern Europe there are some beers which are stronger than [22] that. Although their sales are going down.

But the mainstream is in the 3.5 to 5.5 bracket.

Q. Now, when you're expressing these percentages, are you talking about alcohol content by volume—

A. Yes, I am.

\* \* \* \* \*

Q. Has the range of alcohol content of malt beverages in the United Kingdom changed to any extent as a result of alcohol disclosure laws?

A. Well, as I was saying earlier, one cannot be entirely certain about that. Because you're looking at a situation where there was no declaration to one where there is a declaration. [23] So the comparison is not strictly available.

Except each brewer will know about each brewer's own strength and any of the competition's strengths that they measure. But they don't put that into the public arena. So I cannot say that there has been absolutely no change for that reason.

Has there been any significant change? Significant change, which I would define for you, if you like, is one which is going to impact the consumer. And therefore the consumer will be aware of it and therefore it will get into the media and into the trade press.

And the answer to that is there has been no such commentary in the trade press or media. And therefore there has not been a significant change.

Q. Do you have an opinion as to whether or not alcohol disclosure laws in the United States would cause a

significant change in the marketing practices of brewers in this country?

A. It would be foolish to say that it is impossible for there to be any change. Because in a competitive market many strange things can happen. So I have to express my opinion in terms [24] of extreme unlikelihood of there being a significant change because of that. For a whole number of reasons. One or two, to start with, impress me.

Reason number one is that brewers in virtually all countries—beer is a volume business and they're motivated by thousands of barrels. And the—all the evidence of the beer business is that in most countries there is a bell-shaped curve around that mainstream 3.5 to 5.5 bracket. And that's true in this market as it happens also.

And that's because beer, which is primarily drunk for refreshment, is at its most refreshing at that strength level. The stronger beers are less refreshing. And therefore, the brewers will continue to target where the volume is and that's it.

Which is not to say that they won't introduce other beers at a lower strength and a higher strength because they wish to cover the market. But that's not where the volume is. And they will continue to put their marketing efforts primarily to where the volume is. That's one reason.

[25] I know I said I'd give you two. The second reason is that in the climate of opinion about alcohol in this country at the present time where it is perceived as a drug by many people, which is a controversial thing. It's a drug in a sense. So is caffeine. But it's not a drug in the sense of hard drugs, with which it's nowadays linked in this country.

And in this climate of—in this marketing environment it seems to me highly unlikely that any of the brewers will go after targets that will be considered by mainstream opinion as being irresponsible marketing.



Q. Now, you said that the alcohol products with respect to malt beverages show basically a bell curve; is that correct?

A. Uh-huh.

Q. And does that bell curve, is that the lowest in alcohol content and then curving up and down to highest in alcohol?

A. Yes. And let me be clear, I'm talking in very loose terms. I haven't done the statistical analysis to prove that there is a normal, to use a technical word, shape for the distribution of beer volumes.

[26] But in broad terms I'm saying that there is a central mass of business in that central span. And then there are some extremes coming off the end of that which are the low and the high extremes.

At least there is in unregulated markets. Obviously markets where beer strength is regulated and has to be particular bands, that interferes with a free market. In a free market you tend to get that shape.

Q. Have you thought about how instituting alcohol content disclosure laws in this country might affect that bell curve of the alcohol strength of the products that are regularly sold?

A. It's my opinion—and it can only be an opinion—that, as I said earlier, that the brewers may increase the range that they offer in order to fill all the segments. That is not to say that they will increase competitiveness in the less popular areas; i.e. very low strength and very high strength. And it isn't to say that very much more will be consumed in those areas.

But obviously, once the consumer is more aware of strength on pack, there will be a concern likely, to look at other countries, for brewers to [27] be sure that those categories are filled.

Q. I'm going to hand you a blank piece of paper. And I'll ask you to draw in red ink, the bell curve as you see it presently. And then draw in another ink how the bell curve of alcohol content—

A. Better give me your red pen.

Q. —might change, in your opinion, if alcohol content disclosure laws are premitted.

A. In this country?

Q. Yes, in this country.

A. I'm going to mark this illustrative and non-statistical. Because obviously this is not based on any market research or other research. It's my understanding that light beer is slightly under 4 percent alcohol by volume. That may or may not be correct. But it's somewhere around that. So for argument sake I'll put 3.8 there. And regular strength beer is around five. And there's more liquors up around six or higher.

MS. ROSENBAUM: By volume or by weight?

THE WITNESS: By volume. Yes, by volume. Now, so therefore at the moment in this country you have very little in the—so this is not correctly drawn. You have hardly anything in [28] the very low area. You haven't got much in very high either.

BY MR. OADE:

Q. Try it again, here.

MS. ROSENBAUM: What's wrong with the first one?

THE WITNESS: I would like to change my mind because I made those tails too big. Because the markets are smaller than that.

MS. ROSENBAUM: You're not going to mark this as an exhibit?

MR. OADE: Well, the witness is going to correct it. If you want to use it on cross-examination you may. But I don't want to clutter up my deposition with it.



MS. ROSENBAUM: Okay. Thanks.

THE WITNESS: It's my understanding that the malt liquor market is about 3 percent of the malt beverages market. And whether that's correct or not, that's what this is supposed to say. So if my drawing isn't really very good, I'm just making an argument for that.

(Drawing diagram.) Are we talking about sales or number of brands? Sales?

BY MR. OADE:

[29] Q. Sales, yes. And number of brands and sales of number of brands.

A. Well, that's three different curves. I don't think I can do that. So that's—I wouldn't pretend to be an artist.

MR. OADE: All right. Let's mark this as Deposition Exhibit 2. And then I'll ask you to explain it.

(Whereupon, Deposition Exhibit No. 2 was marked for identification, and a copy is attached and hereby made a part of this deposition.)

THE WITNESS: So what I'm basically showing there is that the volume of sales will, in my opinion, continue to be in the existing broad band of the central mass market.

But there will be some marginal increase, which in terms of the total beer market will be very small. In terms of various different tails will be relatively big relative to them. Because people who are interested in these things now that they can see them on the pack will want to try them.

And I think that that seems to be the experience of other countries insofar as I can tell. This is not very solid information.

[30] BY MR. OADE:

Q. So when you say the tails will increase, you're saying that there will be some marginal increase in both low alcohol malt beverages and high alcohol malt beverages?

A. That will be what my expectation is.

\* \* \* \* \*

Q. Have you become aware in a general sense [31] of the level of knowledge of alcohol content in this country with respect to malt beverages?

A. I was first made—and I've been vaguely aware ever since I was to school here. And I went out to buy some beer and I couldn't find out how strong it was. So that was in '68.

But the main force of this issue came home to the industry at large, including me, with the Seagrams equivalency campaign, which I can't remember how long ago that was. But it's pretty well known. And they did a lot of work in this area.

Q. Does the professional literature at all address the knowledge of alcohol content of consumers in this country?

A. Yes. And I made a reference in my opinion to a paper that I'd come across, which is a new one. And so I thought that was a perfect one to quote. Which is the one indeed we brought up earlier which is the Martin, et al paper in the Journal of Drug Education.

Q. I will hand you a copy of an article entitled "Young Adults' Knowledge of the Strength of Different Alcoholic Beverages" and ask you if you can identify that document as the study [32] referred to in your report.

A. That is the one.

MR. OADE: And I'll ask the court reporter to mark that, please, as Exhibit 3.

(Whereupon, Deposition Exhibit No. 3 was marked for identification, and a copy is attached and hereby made a part of this deposition.)

THE WITNESS: May I volunteer a comment here?

BY MR. OADE:

Q. Certainly.

A. Of course, I've only just recognized that your name in the bibliography is you. And I thought one might assume that I received this document from you. I would like to say actually that the reference I picked up was from the Center on Information on Beverage Alcohol. And that was my lead to that particular article. It wasn't from the attorney.

Q. Thank you for that clarification. Now, do you have an opinion on whether or not the experiences of these other western countries we've been talking about with disclosures of alcohol content of malt beverages is at all relevant to what might happen in the United States if alcohol [33] disclosure was permitted?

A. To answer this question may I briefly digress. One of the things one comes across most often as an international marketer is a view of people in any particular geographic location that their market is totally different to anybody else's. And if you go from London to Manchester they will tell you Manchester is entirely different from London and bears no relation to it.

And wherever one goes in the world, this is what one would hear. And the truth of the matter, of course, is that there are similarities and differences everywhere.

And Ted Levitt published a famous article in 1983 about the globalization of markets drawing to the fact that in today's communication age, the world is becoming so alike that one can now in marketing terms concentrate on the similarities and forget about the differences.

So of course there are differences and similarities. But my answer to your question is I think the similarities here are more important than the differences.

Q. And what do you see as the similarities in the

American marketplace as compared to the [34] marketplace in Canada, United Kingdom or the European community that you think makes their experience with alcohol disclosure laws relevant?

A. The Canadians obviously share 4,000 miles or whatever it is of common boundary and, with the exception of one province, a common language, and very similar styles of beer. The marketplace is becoming increasingly alike, especially in the beer category as the American—as the Canadians move to deregulate the industry there.

Obviously, if one moves to Europe there are bigger differences for various reasons. One could argue that there are bigger differences within Europe than there are between the United Kingdom and the United States. And yet, the Europeans introduced one piece of legislation on this particular subject across all the 12 different countries and cultures of Europe with no hassle and surprisingly easily with little consumer comment or complaint. And indeed, it was a consumer interest move.

And so that I would look to the similarities of culture. I mean, the beers in this country mostly originated from Germany. Most of the people in this country originated from [35] Europe. And therefore—I mean, there are differences, of course.

One of the many differences, to keep this even-handed, is in the distribution system whereby you have a legal three-tier system which is not true of Europe. And the consumption on premise in the UK is greater than it is in the USA. But I don't think there's really consumer differences. Those are just means of getting the product to the consumer.

Q. Now, you have, I take it, studied and taught marketing not only in the UK, but also in Canada and the United States; is that correct?



A. Yes. I mean, by taught, I haven't taught at an American business school the way I do in the UK. But I've taught in company seminars and that sort of teaching.

Q. Based on your experiences in teaching marketing and doing marketing, do you see any fundamental differences in the marketing approach of American brewers that would indicate to you that beer is marketed in this country in so different a way that the experiences of these other countries is not relevant?

A. No. I think that the—again, there are [36] differences within Europe which are greater than the differences between the United Kingdom and the United States. And I think sometimes it's very great.

For example, in both the United Kingdom and the United States television advertising is the main vehicle for the marketing of beers. In France, you're not allowed to use the television for advertising beer, which was banned about 18 months ago. So there are, as I say, more differences in Europe than there are across the continent.

Q. Have you had occasion to read the decision of the US Court of Appeals in this case with respect to the issue in this case on alcohol content disclosure laws?

A. The decision in the Court of Appeals. You sent me some material about the trial at the federal court level. The Court of Appeals, if I read it, I have forgotten it.

Q. Okay. Do you have an opinion with respect to ways to prevent the alcohol—or the marketing of malt beverages based on the alcohol strength other than suppressing information to consumers?

[37] MS. ROSENBAUM: Objection. Counsel is testifying at this point. There's been no evidence that information has been suppressed from the consumers. In fact, there's other evidence in this case which indicates that such information is available from other channels.

BY MR. OADE:

Q. Well, I will limit my question to suppressing information from consumers on labels and in ads on malt beverages.

Is there a way to prevent brewers from marketing the product based on alcohol strength that would allow consumers to be informed of the alcohol content of the products on labels and in product ads?

A. I have to say I like the objection more than I like your question. Can I just—am I allowed to ask questions about the objection?

Q. Certainly.

THE WITNESS: As I heard you to say, you said that it was all right to tell the American public about the strength of beer as long as you didn't put it on the pack. That's what you said?

MS. ROSENBAUM: Put it on the pack or put it in the advertisements. Yes, that's correct.

[38] THE WITNESS: So the position being taken here that it's all right to tell people as long as you don't put it in the appropriate place.

MS. ROSENBAUM: I'm not an expert on this. And I'm not testifying today.

THE WITNESS: I'm just a seeker after truth here.

MS. ROSENBAUM: I'm just correcting the impression that the information might not otherwise be available. Because in point of fact it is.

THE WITNESS: Very good. I'm sure we'll come back to that. Can you ask me your original question again more briefly. Because I was having a job with it.

BY MR. OADE:

Q. Yes. What I'm trying to get at here is you are aware that the government's position in this case is an asserted fear that if alcohol content were disclosed on product



labels and in ads, that that would lead brewers to market their product based on alcohol strength; are you aware of that position?

A. Yes.

Q. Is there a way to accomplish that goal [39] while at the same time permitting alcohol content disclosures on product labels?

A. The short answer is yes. And I think this seems to me, when I read the account of the trial, the substantive issue.

And therefore, while I was asked the narrow question of would alcohol strength wars or beer strength wars result from putting the quantities on the packages — and that was a narrow question — the reason why I answered it in my opinion much more broadly to incorporate the wider aspects of social — what the wider social aspects, which I'm sure some people would think was inappropriate, the reason for that was precisely because the comment I read there of no more extensive than necessary.

In other words, it seemed to me reading that — and I'm not a lawyer and I'm not an American, so if I'm going too far you have to stop me — that what the ordinary person is looking for here is a mechanism which will permit information but curb abuse. Therefore, the question just asked, what other means are there for curbing abuse. And maybe those means are better tailored, more appropriate and less extensive.

[40] And the answer to that is yes. In the Code of Practice that I attached, there is a prohibition on marketing beer on strength and using words like "extra strong" or anything like that to market beer with. Now, it's also the law, as I understand it, in this country and would continue even though — even if the quantities were put on the packs.

This Code of Practice which was put together in the

UK in the mid-70's originally was very influential on various other codes of practice put together in other countries around the world. And the Federation Internationale des Vins et Spiriteux — that's going to stretch you — used it in its worldwide recommended Code of Practice.

And there are codes of practice in this country for the Beer Institute, the Wine Institute, and the Distilled Spirits Council all have codes of practice. And to stay with beer, which is what we're talking about, I believe that codes of practice prohibiting the use of strength in marketing is the norm, is effective, seems to work.

Q. Would you turn to page four of your [41] report, paragraph 3.4. And I'll read this into the record and then I'll ask you a question.

"There is a clear distinction between the provision of factual numeric information on packaging and the use of value laden semantics, such as strong, export or heavy. My understanding of this case is that Coors seeks permission for the former but not the latter."

Is that your opinion that there's a clear distinction?

A. Yes.

Q. And would you explain that, please, what the distinction is.

A. I'm sorry. I'm not quite sure that I can explain the difference between black and white.

What do you mean by that?

Q. Well, when you say there's a clear distinction between the provision of factual numeric information and the use of value laden semantics, such as strong, export or heavy, I guess my question wasn't very good. But with respect to that distinction, is that what you were just explaining?

A. Yes, it was. And as I said, the prohibition of the use of strength as a marketing [42] weapon can be

catered for directly. And I've used the analogy several times in this document about cars. Which is not inappropriate analogy with alcohol. And that if you want to control people from speeding it is the customary practice to prohibit people from speeding with speeding signs and police and radar traps and directly addressed to people who are speeding.

The equivalent would be to take speedometers out of cars so that people wouldn't know when they were speeding on the grounds that having a speedometer in a motor car encourages one to go faster. That is an analogy. No analogy is perfect. But I'm simply explaining the difference between what is appropriate and what is inappropriate.

Q. Are there other ways to prevent the marketing of high strength malt beverages that you're aware of besides a marketing code that would prevent the use of the term "strength" and of course just suppressing all information on product labels? Are there ways in other countries to prevent brewers from making a high alcohol strength product?

A. Well, of course one could just ban the [43] sale of any beer above a certain strength. I don't think that would be a very sensible thing to do because the public is very unlikely to buy significant quantities of high strength beer in any case.

But answering your question, that would obviously be a feasible thing to do.

Q. Why, in your opinion, is the public unlikely to buy any significant quantities of high strength beer?

A. Because in markets where they're available, including this market, that is what happens. We were saying earlier the total liquor market in this country appears to be about 3 percent. And the very high strength segment of

that appears to be about a third of that, about one percent.

So that people who are already exposed to these high strength beers are not buying them. And according to some of the evidence, I'm told people are fully aware of strength at the moment. Though I have to say that is a contradiction with some of the evidence we've seen elsewhere. So I think that's an area for dispute.

Q. Are you referring to Mr. Pirko's evidence [44] that people in this country are aware that malt liquors are higher strength from an alcohol content point?

A. I think that is true. I think that by and large, these people who are likely to drink malt liquor are aware of their higher strength.

Q. Are there higher strength malt beverages in other countries that do not enjoy the popularity of regular beers that we could analogize or look at as being similar to malt liquors in this country?

A. Yes. I mean, there are very strong, bitter beers in England. Ruddles, for example, markets a County ale which is very high strength by bitter standards. I think it's about 6 percent. But what they sell by volume is far more their ordinary ale, which is some — far more popular and sells far more.

Q. Do you know of any high strength malt beverage anywhere in the world that could be described as anything other than a fringe product in the industry?

MS. ROSENBAUM: Objection. What do you mean by high strength? I'd like to have some kind of an indication of alcohol strength. Because [45] what you think is high strength might not be the same as what he thinks is high strength.

BY MR. OADE:

Q. Well, could you tell me what define as high strength and what characterized the high strength end of



the market in other countries and indicate whether those are fringe products or mainstream products.

A. Yes. I have a bigger problem with the expression "fringe". But there are examples of relatively high strength. Karlsburg Special Brew in the UK, for example, is a high strength beer. It's about 8 or 9 percent. And that is a fringe product in a sense the volume isn't that great. But it's quite a significant sale and it is widely available.

And throughout this whole evidence I've seen, if I may make a very general point, I've been concerned that people have not taken volume into account in relationship to strength. It's crazy, especially in the beer market, as well as the other markets, to consider strength without looking at the effects on volume.

And therefore, as I said in my opinion, it is quite common in many places, including the [46] UK, for people to drink one or two beers of high strength in place of four or five beers of low strength.

But you know, you've got to look at that side by side. And therefore, in a sense there are two different markets there.

Q. Do you have an opinion as to why high strength, relatively higher strength malt beverages have not enjoyed the same popular appeal as the more mainstream products?

A. Well, the comment I made earlier was that beverages, beer is primarily a beverage of refreshment. And above a certain alcoholic strength it loses some of that characteristic.

Q. When you say refreshment are you talking about taste?

A. I'm talking about feeling thirsty before drinking and not feeling thirsty afterwards. Or thirsty—you know, it's a hot day. And you know, you're by the pool or what-

ever. And it's not the equivalent of going for a swim exactly, but if you see what I mean, it makes you feel watered down a bit, so to speak.

Q. Do you believe or do you have an opinion that the type of marketing regulations currently [47] in place in the United Kingdom forbidding marketing based on the strength of the product would also be—or has been effective in the United Kingdom and other countries? Has that been effective?

A. There isn't any marketing on strength grounds. And my reason for saying that is that if there were, there would be complaints. And there haven't been. Whether it is the marketing code, the advertising code which has directly created that situation or whether the beer marketers wouldn't have done so anyway has to be hypothetical.

All I know is that there is a code and there isn't abuse.

\* \* \* \* \*

[66] MR. OADE: That's all the questions I have.

#### EXAMINATION

BY MS. ROSENBAUM:

Q. Mr. Ambler, my name is Robin Rosenbaum. And I'm here on behalf of the Department of Treasury from the United States Department of Justice. And I'm just going to ask you some questions about the things that you just testified to.

\* \* \* \* \*

[76] Q. What is your understanding of this litigation?

A. That in the mid-30's at the end of prohibition there was a concern that declaration of strength on packaging would lead to sales of beers by strength rather than other features. And [77] therefore there was litigation [sic] in



1935 prohibiting that on malt beverages but not on spirits or wine.

And that more recently there has been a concern that that prohibition is not in the consumers' interest and is not appropriate. And therefore cause for reasons which, at the time I was briefed, were not clear to me. And frankly are not clear to me now. And it doesn't seem to me helpful to inquire as to what those reasons are.

But for whatever reasons, Coors is litigating to give that information to the consumers. Which in my opinion, is the right thing to do and consistent with worldwide practice. And therefore, when I was asked about it, I was—that's what I understood.

Q. Are you aware of what the US Congress was concerned about when it initially passed this legislation in 1935?

A. I'm not sure you're being very kind about my age, but.

Q. This is meant to have absolutely no reflection on your age. Have you become aware through—

[78] A. I only became aware through the correspondence I had from Mr. Oade.

Q. And what is your understanding of Congressional concerns for this legislation?

A. Of the current Congress or the Congress in 1935?

Q. Any and all Congressional concerns that resulted in this legislation.

A. Well, as I was saying earlier, that the concerns that resulted in the legislation, so we're talking about a period of time before 1935, and it was at a time when America was coming out of prohibition, which was an attempt to use an extreme variant control theory to curb alcohol abuse. We were talking earlier about—or we will be talking again perhaps about whether America is like Europe or not.

But the same pattern which led to prohibition in the United States was happening in Europe and indeed in the United Kingdom. The reasons why prohibition came to pass in this country and did not come to pass in Europe were relatively minor and technical. And indeed prohibition failed.

Q. Maybe you misunderstood my question. My [79] question is what specifically was Congress concerned about when it decided to pass the statute at issue in this question, the statutory provisions at issue in this—

A. That's what I don't really understand—my understanding is that Congress was concerned that if strength could be declared on packaging, brewers would focus their marketing efforts on the strength of the product and would make claims for strength rather than make other claims.

Q. Is that the only concern that you thought Congress had when they passed this legislation?

A. I haven't, I have to say, given enormous attention to what Congress might have been thinking about in 1935. That was my understanding of what their principal concern was.

Q. You say their principal concern. You're not aware, though, right now of any other concerns they might have had?

A. I'm not.

\* \* \* \* \*

[83] Q. Now, with regard to the UK Brewers Society, you've said that you were on the Council. What do you do as a member of the Council?

[84] A. Take part in monthly meetings where they consider the strategy for, you know, issues that come up with the beer industry. It's not unlike the Beer Institute in the United States, similar organization.

Q. What kind of issues come up?

A. Exciting issues as to whether a beer glass which holds a pint of beer should be calibrated just below there to a pint in order to allow for the head on beer. Whether a barrel should be marked with some coding system to stop people stealing barrels when they're supposed to come back. The annual submission to the Chancellor of the Exchequer not to put up the tax on beer. The public relations campaigns.

And quite importantly, coming closer back to this, the social responsibility of the beer industry. And in other words, what should be done to counter alcohol abuse.

Q. Now, when you say that this is not unlike the Beer Institute in the United States, would it be correct then to say that the people who are on this council all have interests in promoting beer?

A. The companies that they represent have.

Q. They all represent beer companies?

[85] A. Yes.

Q. Except you?

A. Not entirely except me. That International Distillers and Vintners was a subsidiary of Grand Metropolitan, which during the time I was on the council of Brewers Society, also owned Watney, Mann and Truman Brewers, which was the fourth largest brewery company in the United Kingdom.

Q. Now, you say that Grand Metropolitan also owned this beer company. But you never actually worked in that division, did you?

A. Well, again I was—that division—it's too complicated. It was a sister company and therefore I was connected with it, aware of some of their problems and issues, worked closely with them. Was I directly employed by Watney? No, I wasn't.

Q. Because in fact you were employed by IDV, right?

A. Correct.

Q. And IDV principally, I think you already discussed, is in the business of wines and liquors; isn't that true?

A. Indeed it is.

[86] Q. And wines and liquors have substantially different markets from beers; wouldn't you agree?

A. No.

Q. You wouldn't agree?

A. No.

Q. You think that the market for wines and liquors are the same?

A. No.

Q. How would you describe the differences?

A. I think there are a lot of people, I'm certainly one—who would drink both beer and wines and spirits. And therefore the consumers overlap to a very substantial extent. There are also some people who drink beer but not wine, wine but not beer and so on.

So that they are going through similar channels of distribution. In this country there is more differences in the channels of the distribution, as I've said earlier, than there are in Europe.

But your question was a general one. And you were talking about the United Kingdom at the time. So the channels of distribution are the same. The buyer of a supermarket group, for example, which are very important in the UK more [87] than here, would be the same person for wines, beers and spirits.

So the consumer groups are similar, more similar than different. They all contain alcohol. They all pay tax. They're the same buyers. There are differences. They are different products. But then there are differences within beer. There are different sorts of beer.



Q. Traditionally beers have been treated differently from wines and liquors by governments of what you define as western countries though, wouldn't you agree?

A. There have been some similarities and some differences.

Q. You would agree then that they've been treated differently?

A. I will agree with that if you will also agree that there are also some similarities.

Q. Well, you would agree, for example, that labeling of beer products as far as alcohol content was not permitted in western countries until two or three years ago?

A. No, that's not correct. It was printed —

[88] Q. By volume, alcohol by volume?

A. And it may have even been permitted. It wasn't mandatory. It is now by law. It has to be on there.

Q. So you're not aware of whether or not it was permitted?

A. Well, there's an old joke about the EC which I won't bore you with. But in Germany nothing is permitted and in France everything is allowed as long as it's not permitted. And so it goes on. The word "permitted" does not translate between EC languages.

Q. Well, then let me rephrase. If a beer company put on its label alcohol by volume percentage prior to, let's even expand it to the last five years.

A. In the United Kingdom?

Q. Well, no. Let's talk about the European community.

A. Then let's take one country at a time.

Q. Okay. Because that's what you've testified to.

A. So which country are you going to try for?

Q. Let's just go through the list. We can [89] start with the UK. Let's say that a beer company put alcohol by volume percentage on its label in the UK five years ago.

A. Uh-huh.

Q. Would that beer company be in any kind of trouble?

A. Not from a legal point of view. They wouldn't have been breaking any law.

Q. Weren't beer alcohol contents supposed to be listed by bands of gravity at that time, though?

A. Yes. And they would have had to have done that as well.

Q. Okay. How about in Spain; same question.

A. And in fact, it would have been legally impossible to stop them for a very simple reason. That what is legally packed in one EC country is more or less legally available everywhere else. That's a slight oversimplification.

But you're aware of the Cassis De DiJon case, which is an extremely important one in the EC language.

Q. Is that a beer?

A. No. It's a cordial. But the case [90] applied to all categories of products. And it's another example of the similarities, if you will.

And what it basically said was that some countries were banning the import of that product because although it was legal in France, some of the contents were not legal in other EC countries. And the EC court ruled that if it was legal in France it was legal everywhere in the EC.

And same thing applied to labeling. And indeed, beer was being imported from the continent with alcohol by volume on it. Because in France, as I said, it was on prior to that. And it would not have been possible or indeed sensible and why would anybody ever want to challenge that in a court.

Q. Let's take Sweden, for example.

A. That's not part of the EC.

Q. Well, would you consider that a western country?



A. Yes.

Q. Well, then would that country have permitted alcohol by volume percentage to be on the labels five years ago?

A. Well, Sweden has alcohol by weight. The [91] Swedes are very permissive people. I'm not an expert on Swedish law so I cannot answer your question for sure. I would have been extremely surprised if there had been any prohibition of declaring alcohol by volume in Sweden in addition to declaring alcohol by weight.

Q. Alcohol by volume has always been permitted on—I'm sorry. Alcohol by weight has always been permitted on beer labels in Sweden?

A. That is currently has to be on. When legislation was passed, I don't know.

\* \* \* \* \*

[92] Q. Yes.

A. So that in other words, if you're having a fancy dinner in one of these smart rooms across the corridor, you would expect to be served wine rather than beer. If on the other hand you were at a ball game, you might expect to be served beer rather than wine. But not necessarily.

Q. And traditionally, wines will vary, although they'll vary in alcohol content significantly, most center around 10 to 14 percent; isn't that true? Leaving out fortified.

A. That is essential band. And may be a little bit higher than 14, but yes. The percentage variation of wine is, interestingly enough, less than the percentage variation of beer. Therefore you would argue there was more need to tell people about the variations of beer strength than wine strength.

Q. If you could just answer the question to the extent that you can. I mean, if you need to expand on your answer in order to explain it, that certainly is fine.

A. Just trying to be helpful.

Q. I appreciate that. Beers, however, according to your testimony, are usually between 3 [93] and 6 percent alcohol by volume; isn't that true?

A. Yes. I meant it as 3 and 9 percent. But the main volume brands, as I was saying earlier, lie between 3.5 and 5.5 in the UK. And indeed, I believe here.

Q. So the average wine starts at twice as much alcohol as the high end of the average beer; is that correct?

A. That's correct. But as I also said, you have to take volume into account when you look at strength.

\* \* \* \* \*

[105] Q. Would you say that the average range—when I say average, I mean where most of the sales are. Not the median, but the average range of alcohol beer contents—alcohol contents in beers in the United States is the same, less than or more than in the United Kingdom?

A. I think the average beer strength in the United States is higher than the United Kingdom.

Q. And what do you think the average beer strength in the United States is?

A. Between 4 and 5 percent.

Q. What do you think the average beer strength in the United Kingdom is?

A. Around 4 percent.

\* \* \* \* \*

[113] (Lunch break taken.)

BY MS. ROSENBAUM:

Q. I think we were talking about marketing or we were just about to start talking about marketing right before lunch. So we'll just pick up there. Can you give us a definition of what marketing is.

A. I can give you a dozen. But the conventional one

has to do with satisfying consumer needs profitably.

Q. So the purpose of marketing then would be what?

A. Satisfying consumer needs profitably. Sorry, doesn't that answer the question?

\* \* \* \* \*

[115] But marketing is a very subjective thing. It is about achieving what it is you want to achieve.

Q. With respect to profitability, are you aware of what size of the market share of United States malt beverage market a beer company would be interested in pursuing?

A. More than they have at the moment.

Q. So anything more than they have at the moment?

A. The more—the bigger the profitability than they have now, the more interested they would be.

Q. Let's say for example, and I'm just making up a hypothetical, a beer company has 15 percent of the market in the United States. And there's an opportunity for one percent, a one percent market share in an area in which they do not now have products. Is that something that you think a company would be interested in?

A. What do you mean by interested?

Q. Does it seem like it would be worth their time to pursue one percent of the market share?

A. And abandon the 99 percent?

Q. No, I'm not saying and abandon the 99 [116] percent. I'm saying keeping everything else the same, keeping their 15 percent where it is, there's also an opportunity to enter a segment of the market in which they are not now involved. So they could increase then to 16 percent.

A. That's an unrealistic point that you just made. If you say to me, "Assuming everything else is the same, would you like a hundred dollar bill?" The answer is yes. But life, in my experience, is not generally like that. And

you usually expect something in return for your hundred dollar bill.

And therefore, in the real world something has to give if you want something, by and large. And American beer marketers are sophisticated people. And they know that they're faced by choices.

Q. But if a company were not involved in a certain segment, it seems that if they entered a segment that had one percent of total malt beverage sales in the United States that they were not previously involved in, there would be a profit opportunity there.

Would you agree with that?

A. Not necessarily. Not necessarily. How [117] can you assume that the niche that you want in is a profit opportunity? By and large, things that you're not currently doing are less profitable than things you are currently doing.

But I mean, since you're reaching after generalizations I'll give you one. Would you like to know why?

Q. Well, you have earlier testified, for example, that the current trend is—and correct me if I'm mischaracterizing what you've said—but as I understand your testimony, you have said that the current trend is towards entering all the segments of the market; is that correct?

A. There is a current trend to increase the range of products. This is across a number of categories. I'm not specifically specifying beer here. To extend the range under a single brand name. That's what the French call flankering.

And I used the example in my opinion that Alpo, which was more or less only in canned dog food four years ago now has a range of all other kinds of dog foods as well. Because they're trying to fill categories as a whole, not just with the can.



Q. Well, let's talk about beers. Would you [118] say, for example, that light beers would be an incident of this flankering?

A. Yes, in a sense. That is to say that Miller had its regular style of beer before it had Miller Lite. And then it elected to put out Miller Lite in the same bracket.

The question that you're posing is one of the fact that people look at the variety of products under the same brand name or different brands in the same category, which are two different choices they offer the consumer.

And they are faced by choices as to whether you have—you spread your energies across many different ones or you focus your resources and your time and your money on fewer. And these things go in trends.

And as a generality what we're currently in a trend, and partly due to recession, there is more range extension going on. And we will see that trend change and go backwards. Sort of goes up and down a bit.

But if we're looking at a long-term issue like we're looking at today, which is long-term effects of putting numbers on beer packages—

Q. Well, that's actually not the question [119] right now—

A. The question is relevant. I'm sorry I was—

Q. That's okay. In the type of situation where we have flankering, if I can use that word, going on right now, every time a new segment is sort of targeted separately, is there a risk that it's going to take away from an already existing segment?

A. That's what I meant by when you asked me earlier if you would always add and I said it's a choice. Because when you add something there's a risk that you will take away energy and focus and money from something else. So you have to weigh that.

Q. So if one's competition is investing in a new segment and it's taking business from the main area of production of your own company, might you then be interested in pursuing an additional product in the other segment?

A. You might. But you would look at that probably rather differently. And this is precisely the reason why the changes that we're thinking about are unlikely to have the effect that you're worrying about. Let me explain.

[120] If a major beer company with a major brand in the mainstream segment, which is let's say 5 percent alcohol, elects to put a massive effort into a beer at 7 percent alcohol, then that effort to some extent is going to come from their activity behind the mainstream brand.

If the mainstream brand is selling whatever number of barrels it is, even the success you quoted as a quarter of million barrels of St. Ides may open up your mainstream brand to the competition to attack that segment. And that's probably what the competition will do.

So you would be very reluctant to imperil your mainstream brands with their existing strength to go after high strength which is relatively small opportunities. Because the gain is unlikely to be worth the risk.

And quite apart from anything else, you can do that under existing legislation. Which is, you were saying earlier, people are aware of. Not really. They're not doing it now and wouldn't be doing it then.

\* \* \* \* \*

[131] Q. Well, how about Brian Baldock; have you heard of him?

A. Yup. He's the chief executive of the Guinness Brewing Company.

Q. That's correct. He's the chair and managing director of Guinness Brewing, world-wide. And would it



surprise you to hear that he said, "The beer industry is more regionalized than some others like the food industry and is likely to remain so for some time"?

A. And I would agree with that. And I have not at any time today said that beer is a global business. I said the exact opposite. I said that beer, more than most categories, is very national. Indeed, if you want to push the point, in Germany, for example, it is very regional. And in the UK, very regional. And the Wolverhampton and Dudley Brewing Company is a very regional brewing company. And we agonized about whether we could close the Dudley Brewery which is only 20 miles from Wolverhampton Brewery. We worried about that.

So I have at no stage in the day tried to [132] imply that the beer business is global business, nor is it identical in all countries.

What I have said is if you look at marketing in general, which is what you were previously asking, there are global businesses now like Proctor & Gamble. And if you look at the overall tendency, it is towards globalization. And the Guinness Company is moving in that direction.

And as Baldock rightly said, it is a slow process and tastes are going to be different for a long time to come. They bought, if not the biggest, one of the biggest Spanish beer companies. And their long-term ambition is to be a global beer company. He may not have said it in public. I'll do it for him.

Q. Is the United States a regional beer market?

A. Big region.

Q. So yes, it is, but it's one big region?

A. (Nodding.)

Q. Would you agree with that?

A. Yes. Substantially, yes.

\* \* \* \* \*

[137] Q. Is it your opinion that in order for a strength war to be going on, alcohol consumption must be increasing?

A. In order to answer that question I need to know what your concept is of a strength war. Tell me what a strength war is.

Q. Why don't you tell me what you think a strength war —

A. I'm sorry, it was your question and your language. And therefore, I need to know what you mean by your language in order to answer your question.

Q. I understand that. And I would like to ask the question as you understand a strength war to be.

A. Are you withdrawing your previous question then? This is a new question?

Q. I'll withdraw it for the time, asking you what you define a strength war to be. And then after having defined it, if you could tell me whether you think that in order for a strength war to be raging alcohol consumption must be increasing.

[138] So let's start first with what you think a strength war is.

A. I think a strength war is fantasy. And I've had a lot of problem with it. And as I explained earlier in my testimony, in order to give an opinion I had to come up with some reasonable understanding of what was intended. But I did put the expression in quotes in my opinion because I had a lot of problem with it.

And the answer to the question I gave earlier, which I can't give you exact wording, but roughly to the effect that the concept was that marketers would shift their main appeal to the public from whatever the appeals are at the moment onto the alcoholic strength. And would therefore climb one above the other raising their strength and raising their appeal against that strength.

So that the cumulative effect would be for everybody to raise the alcoholic strength of the brands on a cumulative sort of basis.

That's what I understood you to mean in the absence of any further clarification. But in order to answer your questions on this subject of strength wars, I think I need to have a clearer picture as to what you do mean.

[139] Q. That is fine. If you understand that to be a strength war, then within that context the question is do you think that in order for a strength war to be occurring, alcohol consumption must be increasing?

A. Well, now in order for the strength war to be occurring there has to be some means of communication from the manufacturers to the public of the benefits of this higher strength, right? And I'm not quite clear in this, as I see it, fantasy, how the communication of these higher strength appeals are going to take place within the marketing environment that we are looking forward to, assuming Coors win their case.

Namely, that they will be allowed to put the strength on the package, but will not be allowed to make any claims for strength of any nature.

Q. I don't think that really answers the question. Let me see if I can explain it a little bit better.

Earlier you've said that even the people who do drink higher strength beers are drinking less of them. Right? You said you have to consider volume when you're talking about [140] strength; is that correct?

A. I certainly said you have to consider volume when talking about strength because they have to be taken together. And I was saying that the typical behavior of people drinking a stronger alcohol by volume beer is to drink less quantity.

That isn't a standard that everybody does it, which is

what you just implied. I was talking about what the normal thing is.

Q. What I'm trying to figure out then is are you making a link between drinking more higher strength alcohol and strength wars?

A. I frankly don't understand the question.

Q. I don't understand the significance of the point that you've made that people are drinking less in amount.

A. Well, let's take the French wine market, which may be helpful in this case. Which is a very similar situation.

Q. Well, actually why don't we take the beer market. Because I think you've actually given us some examples in the beer market. And that way we'll stay directly hopefully relevant?

A. But wine market is totally relevant as well. It's beverage alcohol. The point I'm [141] making is that whether it's the French wine market or the British beer market, the overall size of the market in volume terms appears to be going down. And people are drinking better quality. Which will also mean that they will tend to be drinking slightly higher alcohol by volume strength.

They're drinking that not because there's a strength war going on, not because of any claims being made for it, not because anybody's raising the strength of their beer or wine, as the case may be. But as it so happens, the more premium and better quality products tend to be also more alcoholic.

Now, it would be quite wrong, and I made this point in my opinion, to draw the conclusion that that was in any way linked to the declaration of the strength on the pack.

And it's particularly interesting in this context that the strength—and this is where the French wine market is of relevance, if you'll excuse me. That table wines in France have to carry the strength and the quality wines do not

have to carry the strength. And people are drinking, as it happens, higher strength quite [142] unknowingly. What they do know is they're drinking better wine.

Q. Once again, the question is is there any relationship whatsoever—and maybe the answer is no—is there any relationship between the amount of alcohol people are consuming and whether or not a strength war is occurring?

A. I can't handle the strength war fantasy. All I can tell you is, my best answer to the question is there will tend to be a correlation between volume and strength. And there's also a correlation between strength and quality.

And therefore, if people are drinking up in quality they will coincidentally be drinking up in strength. And that is not a strength war by any definition. And probably drinking slightly less. Because at the end of the day people have so many dollars in their pockets to spend on drinking. And if they're going to pay more for something, then they're probably not going to be able to drink as much of it.

Q. Okay, let's just drop the subject for a second. You keep referring to strength wars as fantasies. Are you of the opinion that a strength war can never exist?

[143] A. No. It is possible.

Q. Okay. Could you describe for us how a strength war would exist, in your opinion?

A. If—now this is very hypothetical. If the environment in Country X—this is not likely to happen in the United States—in Country X said you can—you have to put the strength on the packaging and you are not allowed to make any other claim for your product other than strength, therefore the only thing you can compete on is the strength and price. Under those circumstances a strength war is quite likely to happen because the marketers don't have any choice.

That is the exact opposite of the situation we're faced

with here where the marketers are specifically prohibited from using strength as an appeal.

Q. Okay. Now, in your situation that you've given as a hypothetical in Country X, let's say that a strength war is going on.

Does it necessarily follow that the amount of alcohol consumed in Country X will be less than, more than, or the same as, or is there no relationship to what people were drinking before the strength war occurred?

\* \* \* \* \*

[145] Q. Okay. I understand that you think that if you put strength up, that people will probably drink less. And that there's a weak relationship?

A. There's a weak relationship.

Q. But I'm asking with regard to whether or not a strength war going on. Is one of the signs of a strength war going on, one of the symptoms, if you will, that people are drinking less; is that what you're saying?

A. I have a great problem being an expert in strength wars because I've never seen one. And I don't think anybody else has.

Q. So you're not an expert in strength wars?

[146] A. Nobody can be an expert in strength wars because there have been no strength wars. And the whole basis of my testimony is that there aren't any strength wars.

And the whole basis of the US government's position, as I understand it, is that putting alcohol by volume on a can creates strength wars. And what I'm trying to tell you is that those places that have done it haven't had strength wars.

\* \* \* \* \*

A. I have consistently said that I regard my primary expertise in beverage alcohol drinks.



Q. And wine and liquors would be a part of that?  
[147] A. Indeed.

Q. And to your knowledge, there's never been a strength war in wine or liquors either; is that correct?

A. I've certainly said that for beer. And there's reasons for beer. Let me think about the answer. I've never seen any strength war in wine. I've never seen a strength war in spirits.

But it is true to say that people have marketed some higher proof spirits, not very successfully, on a strength platform. But it hasn't been a war and it hasn't been successful.

So I would claim there have been no strength wars per se. I mean, what's happening in the spirits realm is that the strength of Bacardi in the UK has come down. The strength of Gordon's gin in the UK has come down. And I think you'll witness the strength of spirits in this country coming down and they already have to some extent.

So if there is one of these fantasy strength wars going on, it's a lower strength war with the strengths coming down. That isn't a strength war. I mean. That's just people adjusting to the marketplace.

\* \* \* \* \*

[150] BY MS. ROSENBAUM:

Q. Would you think that if a beer put on its label, "number one strongest malt liquor", that it was engaging in selling tactics on the basis of strength?

A. Say it once more.

Q. If on its label it wrote, "number one strongest malt liquor", would that be engaging in tactics trying to sell it on the basis of its strength?

A. I'm sort of trying to give you a clue in the question I asked that you didn't answer. And I appreciate it's my job to answer the questions. But I'll put it more bluntly.

My statement that strength wars for beer cannot exist in the UK or the USA is based substantively on the fact that the regulations specifically prohibit people using that very claim.

Now, if a relatively minor brand flouts the regulation and is not put in its place by the regulatory authorities for several years, then that is not supporting your case for these mythical strength wars. It is purely pointing out that the regulations which are in force were not [151] applied. And if you don't apply the regulations which are intended to prohibit something, then of course the something that they're supposed to be prohibiting may take place.

But you know, you're asking me to speculate about a situation where United States doesn't apply its own regulations. I don't want to do that.

\* \* \* \* \*

[152] Q. Again, the question is—and let's just lay a foundation here. Can a strength war occur when there are no regulations limiting what can be put on a beverages label, an alcoholic beverages label?

A. You asked me to speculate earlier about circumstances in which a strength war could happen. And I did that. And I speculated about a condition where strength was the only appeal that a brewer was allowed to make. I can't really add to that because we are in fantasy land.

I can only address myself as a marketing person, as I was saying earlier, to situations which is the bread and butter of marketing, which [153] are real periods of time and real categories and real countries.

Q. So it's your opinion then that the only time a strength war can ever exist is when beer companies are forced to market their product on the basis of strength only?

A. That wasn't what I said. Let me say it again.

Q. Okay.

A. You invited me to speculate about a situation in which a strength war could take place. I didn't say that that was any situation. That was in your question, not in my answer. I did my best to carry out that speculation in order to try to be responsive to your question.

I'm not prepared to go further into this unreal world. I'm very happy to answer marketing questions. But all marketing is about real world situations.

I was making the point earlier this morning the problem I had with Tom Pirko's research was I found it to be hypothetical. And much of your line of questioning this afternoon has been so hypothetical that, helpful as I try to be, I have to say that it is not related to the [154] real world in which consumers and beer brands are being used.

\* \* \* \* \*

[169] Q. Okay. Now, you also said that within the United Kingdom higher strength beers have gained market share relative to lower strength beers since alcohol content information has been printed on the pack; is that correct?

A. I was very explicit in my opinion that these two things had happened, but I was reasonably certain that they were unconnected. So your use of the word "since" is misleading.

Q. Well, in fact, not making a casual connection, speaking only in terms of timeframe, is it not true that there has been an increase in market share for higher strength beers relative to lower strength beers since the time that alcohol content information has been printed on the packages? Without asking you to draw any kind of casual relationship.

A. There has been indeed a trend towards drinking better quality beer in recent times. And there has also been

a trend toward putting more alcohol information on the package, true.

\* \* \* \* \*

[175] Q. Okay. Now let's talk about with regard to countries other than the United Kingdom. Now, I know that you refer to the CBA for your information about strength wars in the United Kingdom. And I know that it's a worldwide base.

[176] So did you refer to the CBA for your information about strength wars in countries other than the United Kingdom?

A. Well, I didn't refer to it for strength wars because, as I've been saying all this time, strength wars are a fantasy. I take the documentation on a monthly basis and I read it from cover to cover. From front cover to back cover. And I don't find in it anything on strength wars. And on that basis I suggest to you that they don't exist. Amongst other bases.

\* \* \* \* \*

[209] Q. If beer companies started producing higher alcohol products and that information, the alcohol content information were available on the labels and in advertisements, and people started buying higher alcohol products in big enough numbers that beer companies manufactured more of these higher alcohol products, without advertising on the basis of strength but merely by putting the number on the can and in the advertisements, would that constitute a strength war under your understanding of what a strength war is?

A. It would be associated with that. I mean, it's an interesting concept because we're talking about the use of the word strength war in the sense we're talking about earlier where people were escalating the strength of



brands. There's a difference between escalating the strength of existing brands and introducing new brands at higher strengths. And in this particular question you've just asked you were talking about the second, not the former. And I was embracing both in my definition.

So that in a narrow sense, the word on your hypothesis, not on my — by your definition there would be an increase in sales in the higher strength categories. Because that's what you asked me to imagine.

[211] Q. Right.

A. Therefore, by definition there is a strength war because you've defined there to be a strength war, not because I'm agreeing with you.

But I would draw to your attention the slight element in fantasy in that because you're conducting a strength war with no bullets.

Q. Are you saying that advertising is the bullet?

A. Yes. I'm saying that in order to stay with this analogy you have to see communications to the consumer, if you like, as the artillery shells or the bullets or whatever warfare. That is how you achieve your objectives, by making the consumer aware of your appeals. Now, if you can't make the appeals, that is like fighting a war with no bullets. It's a great war, but it's not exactly what people think about.

Q. So then it's your impression that people don't care about what's on the labels as far as alcohol content?

A. I didn't say that.

Q. People do care about what's on the labels as far as alcohol content?

A. They care to a limited extent. And [212] indeed what I have about Mr. Pirko's research earlier — I'm never black and white about anything and there were good pieces in the research as well. And one of the pieces that I

associate with is his commentary about the fact that people are interested but not enormously interested. There was a low level of wishing there to be a war.

Q. Is advertising the only bullet that can be fired in a marketing war? A strength war, I should say.

A. A strength war. There has to be communications. And of course what is on the package is part of that communications, but a small part. It's not really intrusive. You know, if you pick up a can in a certain way you'll never see it.

And the much more — I mean, the reason why people advertise is because information on the can isn't enough. I mean, if it was enough you wouldn't go on about it, would you.

\* \* \* \* \*

[279] Q. Okay. Now, earlier when you were talking about less restrictive ways of addressing this problem, I think you said that one could ban the making of beers above a certain strength and that would take care of the problem; isn't that true?

A. (Nodding.)

Q. Don't you think that would be more restrictive than not permitting these beers to put the alcohol content of the products on their labels and in advertising?

A. I don't. And I also said when I made that comment earlier that I thought that that would be an unnecessary thing to do. Because the evidence was that the consumers weren't interested in those things.

And the reason why it would not be more restrictive is as follows. If you were banning a tail on the bell-shaped curve and let's say for argument's sake you were banning one percent of the market, you were also providing more on 99 percent of the market. So it's a matter of opinion as to whether that would be more or less restrictive. But it



would also be appropriate.

[280] And it's a very interesting comment this one thing about that it would also be appropriate to the end purpose. The end purpose of all of this, as I understand it, is that there should not be high strength wars. You want to ban a war you ban the substance of the war, you don't ban something irrelevant to it.

Q. So you think that—I mean, I just want to be sure I have this straight. You think that it is less restrictive to ban the sale of the product all together than to simply not permit beer companies to put the alcohol content by volume on the label.

A. Well, the word actually is extensive, if I may say so. And extensive precisely means covering a wider ground. And if the object of the exercise is to stop extreme high strength beers, then the least extensive thing to do is to ban extreme high strength beers.

Q. Okay.

MR. OADE: I believe you're referring to the no more extensive than necessary test of the Supreme Court that you quoted in your report; is that correct?

THE WITNESS: I am. Thank you.

\* \* \* \* \*

[293] FURTHER EXAMINATION

BY MR. OADE:

\* \* \* \* \*

[295] Q. You were also asked some questions about warning labels. Are you aware of warning labels in this country with respect to malt beverages?

A. Yes.

Q. And what is your understanding of what they say?

A. I can't give you off the top of the head a segment

of what they say. And there are, I think, four alternative versions which rotate.

Q. In your judgment what is more effective, a warning label or information on actual product alcohol content?

A. I'm not—I mean, I was asked earlier if I supported warning labels in the United States. And I said for technical legal and so on reasons I did. That isn't to say that I think they are a particularly—I'm in favor of educating [296] consumers about the good and the problems of alcohol. And therefore, to the extent that warning labels are educational, that's one of their advantage.

It is inconsistent to warn people about alcohol at the same time on the same pack as not to tell them how much alcohol is in that pack.

\* \* \* \* \*

**[AMBLER DEPOSITION - EXHIBIT 1]**

Re: Adolph Coors Co. vs. Secretary of the Treasury,  
Case No. 87-Z-977

**Opinion of Timothy Felix John Ambler MA SM FCA**

*1. Education, qualifications and experience*

1.1. Currently, and since 1991, Senior Research Fellow at London Business School specialising in international marketing.

1.2. Until then, with International Distillers and Vintners Ltd ("IDV") for 28 years. IDV is now the largest wine and spirit company in the world (by volume) with operations in over 30 countries. It is part of Grand Metropolitan PLC.

1.3. During the 70s, Marketing Director of IDV's UK company. During the 80s, Managing Director IDV UK, then Marketing Director IDV worldwide and finally Joint Managing Director for three years.

1.4. From the mid-70s responsible for IDV's social aspects of alcohol policies, initially in the UK and then worldwide.

1.5. Contributed to the creation of first UK alcohol advertising self regulation code in 1975. Chaired the Committee which prepared the first amendments to it five years or so later and contributed to the only further revision in the late 80s. The code is part of The British Code of Advertising Practice and forms section C.XII. A copy is attached as Appendix 1. The Code is administered by the Advertising Standards Authority ("ASA"), an independent body funded by the advertising industry.

1.6. A member of the Social Aspects Committee of the UK Wine and Spirit Association for about six years including three as Chairman.

1.7. On the Council of The UK Brewers' Society for nearly ten years and currently a Director of Wolverhampton and Dudley Breweries PLC.

1.8. Contributed to the formation of the Centre for Information on Beverage Alcohol ("CBA"), a worldwide database concerned with social, medical and all forms of alcohol information. CBA is funded by the leading international beer, wine and spirit groups.

1.9. MA in mathematics from Oxford, SM in business administration from Sloan School MIT, Fellow of the Institute of Chartered Accountants of England and Wales, Fellow of the Royal Society for Arts and Industry, London.

*2. Facts*

2.1. The following Western countries legally require, or will shortly require, the disclosure of alcoholic content in the form of % alcohol by volume ("ABV"):

Australia, Canada, UK and the other 11 countries of the EC, Japan, New Zealand, Norway.

Note 1: "Western" is defined to mean all first world countries and to exclude the second world (those now or previously communist) and Latin American/third world (developing countries of Africa and Asia).

2: Neither this nor the following list is claimed to be comprehensive. Other countries may also have alcohol disclosure regulations for beer.

2.2. The following Western countries legally require, or will shortly require, the disclosure of alcoholic content in some other form:

Austria (wort content), Iceland (weight or volume), Sweden (alcohol by weight ("ABW")), Switzerland and Leichtenstein (ABW).

2.3. Much of this regulation is of quite recent origin. The current EC law took effect, for example, on 1 May 1989 for beer cans.

2.4. The worldwide trend is to supply the consumer with more on-pack information, not just strength, in a less confusing way. For example: in the 1970s no indication of beer strength was legally required for UK consumers. Then legislation required strength to be declared in bands of "original gravity". Excise taxes were historically levied on original gravity which therefore provided a convenient measurement framework. Consumers did not, of course, understand what original gravity meant. Improvements in beer technology, changes in tax collection, EC harmonisation and consumer demands for clarification together caused the current EC legislation based on ABV.

2.5. As the same time, there has been increasing attention to the regulation of advertising and other marketing practices. A number of advertising codes prohibit the use of alcoholic strength as an attraction. The UK code C.XII 5.4.1 states "While it is legitimate for them to give factual information about alcoholic strength, advertisements should not suggest that it is sensible or desirable to prefer a drink merely for its *high alcohol content* or intoxicating effect. To that end, high alcohol content should not be the principal basis of the appeal of any advertisement." The Danish Code, implemented in February 1991 states that advertising must not "emphasize a strong, high or higher

content of alcohol". October 1991 saw guidelines in Eire similar to the UK proscription on using strength as an inducement.

2.6. In the UK Code, there are also restrictions on "challenging" consumers or showing drinking as a sign of acceptability, maturity or masculinity any of which might be linked with stronger beers.

2.7. In the UK there is no evidence that greater on-pack information of alcoholic strength has lead to any "strength wars" as envisioned by US regulators. There has been a wider provision of both higher and lower strength beers to provide greater consumer choice. Premium, ie higher strength, lagers have been gaining share relative to lower strength lagers but they have not been marketed in defiance of the Code. There are plenty of agencies and individuals hostile to alcohol who would be quick to complain of infringements. The ASA complaints process is well known and effective. Beer volumes have been decreasing and it is likely that consumers are simply seeking less quantity but better quality. In the same way, total wine volumes have been decreasing in France whilst the share of quality wines has been increasing. It seems most unlikely that either trend is influenced by on-pack alcohol strength information.

2.8. UK younger male consumers, who account for the vast majority of total beer consumption, now consciously distinguish "session drinking", where they will stay in a pub or a home for several hours and therefore require a low strength ([about 3.5%] ABV) beer, from a "quick drink" where they will take a stronger (over 5% ABV) lager but limit themselves to one or two cans.

2.9. In Australia, the alcohol by volume requirement is governed by the 1987 Food Standards Code. Current



Australian concerns are not with any abuse flowing from this information but the reverse: the debate is how to provide more relevant information for the consumer. In other words should a "standard drink" be defined in terms of grams of pure alcohol and labelling referenced to grams or "standard drinks".

2.10. In Canada, a "standard drink" has also been defined as part of voluntary trade action but at a higher level than Australia. Advertising and marketing practices are highly regulated. Whilst requiring alcoholic strength to be shown quantitatively, other strength claims are not permitted and there is no evidence of "strength wars". Total per capita beer consumption is declining.

### 3. *Opinion*

3.1. It is illogical to require a warning label on alcoholic drinks and at the same time provide no quantification of the alcoholic content. Providing the warning indicates that the consumer has a rational concern to take care and limit intake for his or her own health/safety or that of others. Beer strengths normally range from 3% to 9%. The same rational concern would need to know which beer is twice the strength of another. Whilst it is true that a minority may perversely take higher strength as a challenge, the same argument could apply to warning labels, ie that they should not appear because they would incite irresponsible drinkers to consume more.

3.2. Given the risks of abuse of alcohol there is a public duty to inform consumers, in clear and unmistakable terms, how much alcohol they are consuming. Whilst I have not seen research directly comparing the knowledge of alcoholic content, within a single study, between the USA and other countries, I have seen research showing a

dangerous ignorance of the alcoholic strength of beer by younger US consumers. For example Martin et al (Jnl of Drug [Education], 21-2, 1991 pp [135-143]) found that 113 young adult drinkers' estimates of alcoholic strengths of malt beverages were less accurate than those of other beverage types. Many younger drinkers, prior to the introduction of warning labels, were unaware that beer was alcoholic at all. I use the word "dangerous" because of the possible consequences of this ignorance for road accidents, water sports and the use of dangerous machinery in particular. The widespread use of warning notices of all kinds has made them commonplace. One might question the value of a generalised warning without quantification. The general European view is that warning labels are not productive but information on strength is.

3.3. I do not argue by analogy but the points above might be illustrated by reference to speedometers in cars. How would the US Government respond to the suggestion that speedometers were withdrawn from cars on the grounds that they might encourage irresponsible drivers to speed? The risk of incitement to drive faster, or sell faster cars, is substantially outweighed by the need to provide accurate information. Speeding could at best only be indirectly controlled by the removal of speedometers; there are more direct, and therefore more effective, means of control.

3.4. There is a clear distinction between the provision of factual numeric information on packaging and the use of value laden semantics, such as strong, export or heavy. My understanding of this case is that Coors seek permission for the former but not the latter.

3.5. It is also illogical to consider strength other than in the content of quantity. Few could argue any harm in

drinking 6% ABV beer rather than 3% ABV if only half the quantity is consumed. (I am aware that there are some marginal alcohol absorption differences caused by volume but the point is illustrative.) When Miller introduced Lite Beer, success turned out to depend on steelworkers in Pennsylvania becoming convinced they could now drink more beer. In my opinion it is important to provide strength information to consumers so that they can adjust their volume intake appropriately.

3.6. Whilst, as indicated above, communication of the unadorned, quantified facts of alcohol content is, in my view, a modern public duty, given the dangers of ignorance, there are legitimate concerns with the means of such communication, ie the regulation of marketing practices. In this respect I was impressed by the US Supreme Court criterion of "*no more extensive than necessary*". It may be helpful briefly to review the background to the voluntary codes of marketing practice which have grown in a number of western countries in the last twenty years precisely to meet this "no more extensive than necessary" consideration:

3.6.1. Why are they voluntary or self-regulating? We are dealing here with subtle shifts of language, visual images, fashions and social values. What is acceptable to the community in one decade is not in another. After considerable debate, the EC was persuaded that legal regulation was too cumbersome, slow and inflexible to deal with the nuances involved; better to use the threat of legislation against the advertising industry to ensure that they cleaned up their act. Whilst each country now has its own codes, one can expect increased harmonisation across countries and product categories, eg in EC countries, the same codes apply to all forms of alcoholic beverage.

3.6.2. If they are "voluntary", are they unenforceable, ie can the less responsible marketers opt out? Clearly there are antitrust implications in some companies coercing others to comply. The simplest solution is for government to require compliance with that country's Code even though it is administered independently. But how? In practice the means of making Codes enforceable vary from place to place but, in one way or another, that is necessary. Otherwise the responsible companies both limit themselves competitively in the market place and have the costs of administering the Code. They are thus doubly penalised as compared with less responsible marketers.

3.6.3. In conclusion, the increasing western practice is for government to persuade marketers to achieve social ends through self-regulation. This may require accommodation on anti-trust or legal (tort) considerations. Some sanction is needed to achieve compliance by those marketers reluctant to participate. *My opinion is therefore that the prohibition of strength declaration is more extensive than necessary* is based on the observation that other countries frustrate any potential "beer strength wars" through better tailored and more direct means.

3.7. There have been no "alcohol strength wars" resulting from the declaration of alcoholic strength on packaging. Whether that is due to the codes of marketing practice that largely parallel strength declaration in Western countries is not possible to determine with any certainty. It makes sense to encourage responsible marketing in any case.

3.8. It is also my opinion that declaration has widened the choice of strengths available to the consumer and that has been a benefit. The drive to offer consumers *lower*



strength options, which some believe began with Swan Light in Australia, may have encouraged more explicit strength information or vice versa. Either way it is beneficial.

3.9. Taking the questions you asked in the same order:

3.9.1. If alcohol content information is disclosed to consumers in product labels and advertisements, would this result in brewers marketing beer based on the alcoholic strength of the product? Why or why not?

It is possible that US brewers might do this if there were no other considerations or restrictions. In the prevailing climate, which expects responsible marketing by all manufacturers and importers of beverage alcohol, that seems unlikely, at least by the five major brewers who account for 90% of sales. There is a beer advertising code of practice and also a Century Council code, which applies to Stroh, both of which would prohibit strength claims, as would the existing semantic regulations which are not being challenged. In short, my opinion is "no" and even if I am wrong, relatively minor changes to codes would take care of the problem.

3.9.2. Based on experiences in other Western countries, would brewers seek to increase the alcohol strength of malt beverages if accurate alcohol content information was disclosed to consumers? Why or why not?

As part of the entrepreneurial pattern of US business and consumer demands for maximum choice, some higher strength beers might well be offered but more as fringe products. It is most unlikely that these would give rise to significant problems as consumers would drink less volume of them. The overall impact of a change in legislation allowing quantitative disclosure is most likely to be

minimal with any harmful effects being more than offset by the benefits.

3.9.3. Is disclosure of accurate information about the alcohol content of malt beverages likely to increase or decrease the use of descriptive product labels such as "power", "high test" or "strength? If the answer is affirmative have other Western countries been able to successfully regulate such activity through the use of marketing codes?

Disclosure of quantitative strengths would have no impact on semantic or descriptive expressions, not least because these are regulated separately. Western countries such as the UK do use codes to prevent the use of strength as a marketing weapon. See above.

3.9.4. What has been the experience of other Western countries with respect to the disclosure of alcohol content information of malt beverages? Are such disclosures generally required or permitted? If so, have these Western countries experienced high alcohol content marketing wars as a result of such disclosures?

Accurate disclosure is now the norm in Western countries as requirements of their governments. No alcohol content marketing wars have resulted.

3.9.5. Is there a noticeable trend toward consumption of higher alcohol malt beverages on a per capita basis in those countries that have permitted or required alcohol content disclosure of the product? For example, when such laws were required in the United Kingdom, did this result in any trend toward increased consumption of malt beverages with higher alcohol content? As noted, the trend in Canada appears to be just the opposite.

In the UK, there has been an increase in share, within a declining market, of higher strength beers. Standard



English beer is generally low in strength (3%-4% ABV). It would be wholly wrong to attribute that increase in share to label information changes. It is part of a wider trend towards premium or higher quality products but in lower volume. Some link reduced volume intake with the decline of manual labour and the associated reduced need to replace liquid and minerals. UK beer consumers are well able to distinguish quality without the prompting of %ABV and have had to do so over the centuries before that information became available.

In other countries there is also diversity of consumer choice but no evidence of higher strength information promoting greater consumption of high strength product. In North East France and Belgium, there are truly high strength beers, 10% or more, but these have always been curiosity products with no wide market. Similarly English high strength beers, such as Barley Wine, have fallen out of favour and are now hard to find.

#### TIM AMBLER MA SM FCA

Currently Grand Metropolitan Senior Research Fellow at London Business School. Prime focus for research and teaching is the management of international brands through a programme named PAN'AGRA.

Previously:

- 1957-60. Read Mathematics at St John's College, Oxford.
- 1960-63. Qualified as Chartered Accountant with Peat, Marwick, Mitchell & Co.
- 1963. Joined International Distillers and Vintners Ltd ("IDV") as accountant for the fine wine division. Later General Manager for bottling and distribution.
- 1968. Science Research Council funded Master of Science degree at Sloan School, MIT. majored in marketing.
- 1969. Marketing Director IDV UK, then an unprofitable business.
- 1972. IDV bought by Watneys, and three months later by GrandMet.
- 1977. Managing Director IDV UK.
- 1982. Marketing Director IDV Worldwide. IDV UK now IDV's second most profitable business.
- 1982-90. At various different times responsible for IDV's businesses in 34 countries, in the last three years as Joint Managing Director. Principal geographic focus on N America.

Personal responsibilities included strategy, acquisitions (notably Heublein, individual brands and controlling interest in Cinzano), marketing (Smirnoff and Croft Orig-

inal in UK) and contributing to new brand development (Baileys UK, Malibu, Piat D'Or, Archers and Aqua Libra).

Currently also a consultant to GrandMet, The Century Council in Los Angeles and a director, Wolverhampton & Dudley Breweries PLC.

Age: 55      Married with one son.

Other interests: Opera, garden demolition and reconstruction.

3 August 1992

[Appendix 1 to Ambler Deposition]

Section C.XII

Advertisements for Alcoholic Drinks

Preamble

1. This section is concerned with accepted restraints upon the advertising of alcoholic drinks; and in what follows, except when the context does not permit, words such as 'advertisement' and 'drink' are to be understood as relating to alcoholic drink, and the way in which it is advertised.
2. The rules in paragraph 5 below are based upon those which were drawn up by the drinks industry in 1975 and which appeared most recently as Appendix 2 to the seventh edition of the Code. As they appear here, they have been substantially reorganised and redrafted and contain new material.

Scope

- 3.1 This section is concerned with the promotion of drinks the alcohol content of which exceeds 1.2% by volume. It applies to:
  - advertisements for such drinks;
  - sales promotions for such drinks, and sales promotions in connection with which such drinks are distributed, whether as gifts or prizes, or otherwise; and
  - other advertisements, to the extent that they show people drinking or give particular emphasis to the name or visual identity of any brand of drink.

- 3.2 As appropriate, advertisements and sales promotions within the scope of this section are required to conform also to all relevant provisions of the rest of this Code.

#### Interpretation

- 4 Both the drinks industry and the advertising business are concerned to ensure that, in appealing to the many who buy and enjoy alcohol in moderation, advertisements avoid anything that can reasonably be seen as likely to lead to the adoption of styles of drinking that are unwise for the drinkers or a source of social and medical problems for the community. No set of rules can cater for every circumstance, but those responsible for the rules which follow understand the power of alcohol to do harm as well as good. They accept a commensurate responsibility for ensuring that these rules are always applied in the spirit as well as in the letter. They do not believe advertisements need to be devoid of humour, but they will not tolerate the use of humour as a way of circumventing the clear intention of the rules.

#### Rules

- 5.1 Advertisements should be *socially responsible* and should not encourage excessive drinking. In particular, they should not exploit the young, the immature, or those with mental or social incapacities.
- 5.2.1. Advertisements should not be directed at *people under eighteen* whether by selection of the medium or context in which they appear, or by reason of their content or style of presentation.

- 5.2.2. No advertisement should feature any *characters*, real or fictitious, who are likely, whether because of their apparent youth or otherwise, to attract the particular attention or admiration of people under eighteen and thereby, in any way, to encourage them to drink.
- 5.2.3. People who are under eighteen should not appear in advertisements except when their presence would be neither illegal nor unusual; for example, as participants in such events as *family celebrations*. When they are so shown, it should always be obvious that they are not drinking.
- 5.2.4. *People shown drinking* in advertisements should always clearly be adults; and to ensure that this is the impression created, advertisers should not engage as models people under twenty-five, or people who look as though they may be under twenty-five, if these people are to be shown in any advertisement either drinking or about to drink.
- 5.3.1. Advertisements should not suggest that drinking, or the choice of a particular drink, leads to *social acceptance* or popularity; or that alcohol is the main reason for the success of any event or occasion.
- 5.3.2. It is legitimate to promote the consumption of particular drinks on particular occasions, or under particular circumstances (for example, champagne at *celebrations*), but if this is done, the advertiser must take care not to allow the implication to be drawn that the choice of a given drink is anything more than an evidence of the good taste of the drinker—that, for example, it can make him better liked or more successful than



those who do not drink, or who drink something else.

- 5.3.3. No advertisement should be capable of being understood as a *challenge* to people to drink. In particular, suggestions that drinking is an essential attribute of *masculinity* should be avoided, as should anything which suggests that the brave, the tough and the daring owe these characteristics to their drinking. No advertisement for a drink should depict or refer to it in the context of aggressive or anti-social behaviour.
- 5.3.4. No advertisement should suggest that the *femininity* or attractiveness of women is enhanced by drinking or by the choice of a particular drink.
- 5.4.1. While it is legitimate for them to give factual information about alcoholic strength, advertisements should not suggest that it is sensible or desirable to prefer a drink merely for its *high alcohol content* or intoxicating effect. To that end, high alcohol content should not be the principal basis of the appeal of any advertisement.
- 5.4.2. Advertisements should not suggest that *immoderate drinking*, however portrayed, is sensible, admirable or amusing. Particular care requires to be taken with advertisements for sales promotions which require multiple purchases.
- 5.5. Advertisements should avoid any implication, particularly when showing men and women together, that alcohol generally, or a particular drink, offers the key to success in *personal relationships* of any kind, or that it can make drinkers more attractive or successful in such relationships.

than non-drinkers, or those who drink something else.

- 5.6.1. Advertisements for drink should not suggest the *enhancement of mental ability or physical capacity*. In any advertisement which features sportsmen, particular care is required to avoid the implication being drawn that their performance, or success, is related to their alcohol consumption.
- 5.6.2. Advertisements should not suggest that drink has *therapeutic properties* or that it can resolve personal problems; in particular that it is acceptable to use it as a means of removing inhibitions, resolving tension or soothing agitation. Advertisements should not suggest that regular solitary drinking is advisable.
- 5.6.3. It is legitimate to base an advertisement upon the ability of an alcoholic drink to slake the drinker's thirst.
- 5.7. Advertisements should not depict *activities or locations* in connection with which the consumption of any drink whatever would be unsafe or unwise. Particular care requires to be taken with advertisements which depict powered vehicles of any kind and especially motor cars.

See also B.19.2 and 3 above in relation to breath-tests, 'safe' levels of alcohol consumption and low alcohol drinks.

\* \* \* \* \*

[1] IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

VS.

NICHOLAS BRADY, ET AL., DEFENDANTS

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REPORTER'S TRANSCRIPT  
(Trial to Court: Volume I)

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Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 10:45 a.m., on the 26th day of October, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

BRADLEY, CAMPBELL, CARNEY & MADSEN, by K. PRESTON OADE, JR., 1717 Washington Avenue, Golden, Colorado, 80401, appearing for the plaintiff.

PATRICIA M. RUSSOTTO and ROBIN S. ROSENBAUM, Attorneys at Law, U.S. Department of Justice, Civil Division, 901 E Street, N.W., Room 912, Washington, D.C., 20530, appearing for the defendants.

\* \* \* \* \*

[6] MR. OADE: First of all, your Honor, I believe we have a stipulation that in 1976, Canada changed its law with respect to malt beverage labeling and advertising to require labeling.

Is that a correct statement of our stipulation, Ms. Russotto?

MS. RUSSOTTO: That's right, yes.

\* \* \* \* \*

[7] THE COURT: And what was the change? Does your stipulation go to what the change was?

MR. OADE: Yes. The change was simply that the law would require alcohol content disclosures on product labels and product ads.

MS. RUSSOTTO: It's my understanding that that's true for beverages that have more than 1.1 percent alcohol by volume.

MR. OADE: That's correct, your Honor.

THE COURT: 1.1 percent by volume.

MS. RUSSOTTO: By volume.

THE COURT: Now, my understanding is that if you're listing the alcohol by volume, it comes to a greater percentage than by weight.

MS. RUSSOTTO: That's also my understanding, your [8] Honor.

MR. OADE: That's correct, your Honor. I believe if you want to convert one to the other, you divide—if you're converting from volume to weight, you divide by .8.

Is that correct, Dr. Patino?

WITNESS PATINO: Approximately.

\* \* \* \* \*

[40] TERRY CATES, called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat, please.

**DIRECT EXAMINATION**

BY MS. ROSENBAUM:

Q. Mr. Cates, how are you presently employed?

A. I'm presently employed as chief of the firearms and explosives division for the Bureau of Alcohol, Tobacco and Firearms, in Washington D.C..

Q. How long have you worked for the Bureau of Alcohol, Tobacco and Firearms?

A. Since January of 1971.

Q. Before the present position that you hold now, what position did you hold?

A. Chief of the industry compliance division for ATF in Washington.

Q. For what period of time did you hold that position?

A. From July of 1988 through—until September of this year.

\* \* \* \* \*

[42] Q. Are you aware of whether Coors ever tried to use numerical statements of alcohol content?

A. Yes, they did.

Q. And do you remember when that was?

A. I believe it—it would have been in the 1984-1985 area.

Q. Would it refresh your memory to take a look at some of the exhibits that have already been entered or stipulated to in this case, AH and AI, the compliance documents that your office received?

A. Sure. All right.

Q. After having looked at Exhibit AH, do you recall when this action occurred against Coors for engaging in

placing numerical statements of alcohol content on its labels or in its advertisements, much like it wants to do as a result of this litigation?

A. Well, our actions culminated in a—what's called an "offer and compromise" in August of 1986.

Q. What were the terms of that offer and compromise?

A. I recall it being a monetary settlement between Coors and the Government of \$150,000, \$25,000 of which was agreed to by the parties to represent a payment for the violation of content disclosure. I think it was in the State of Iowa.

[43] Q. Can you briefly describe the type of alcohol content disclosure, numerical statements that Coors engaged in?

A. Well, they distributed cans of beverages in the State of Iowa which had content—numerical statements of content, alcohol content on them.

Q. Can you also describe the wallet cards that were brought to ATF's attention?

A. In June of 1986, we received a complaint from Anheuser-Busch companies with respect to Coors' allegedly having in the marketplace wallet-sized cards that had alcohol content disclosure of not only Coors but of competing brands.

Q. And the \$150,000 offer and compromise that you just mentioned: Did that also settle the wallet card incident?

A. Yes.

Q. Are you aware of—you mentioned earlier St. Ides had also engaged in putting forward numerical statements of alcohol content. Can you describe how they did this?

A. Well, St. Ides engaged in a practice of placing stickers on their labels that said, "No. 1 strongest malt



liquor." They also had an advertisement, I believe, that compared the St. Ides product to other malt liquor products or malt beverage products, I should say, where the St. Ides product come out as the strongest product.

Q. And that was through a numerical comparison?

A. Yes, it was.

[44] THE COURT: If I could interrupt, there really is—you're making a difference between malt liquor and malt beverage, are you not, malt beverage covering the whole span of beer, and malt liquor just being the specific—

THE WITNESS: Yes, ma'am. There is no legal category of malt liquor. It is all malt beverage. The industry has carved out a niche for itself that is commonly referred to as a malt liquor segment of the industry.

THE COURT: Okay. Thank you.

BY MS. ROSENBAUM:

Q. Now, these statements of numerical content that St. Ides used in its advertisements: Are those the same types of statements of numerical content that you understand Coors to be seeking the right to use as a result of this litigation?

A. Generally, yes.

Q. Did St. Ides ever engage in any other type of behavior other than using numerical statements of alcohol content in an effort to sell its products on the basis of the products' alcohol strength?

A. Oh, absolutely.

Q. Can you tell us about those instances?

A. They engaged in what we believe was extremely egregious advertising, using various rap groups and popular singers of the day to tout the strength of their product, using street jargon that would get consumers to buy their product based on [45] the alcohol strength.

Q. Did they ever—did they ever have any kind of enforcement taken against them?

A. Yes, they did.

Q. And can you describe for the Court what ATF did to respond to St. Ides' behavior?

A. Yeah. After a relatively lengthy investigation, we settled the matter by St. Ides' agreeing to cease and desist those kinds of activities in exchange for a payment of \$15,000, offer and compromise, and agreeing to shut down their business for a three-day period—of three days.

Q. Do you recall when these violations and subsequent remedies occurred?

A. Well, the violations occurred probably during the period of 1988 up through 1991, but the settlement occurred in 1991.

Q. And would that have been late 1991?

A. Toward the fall of 1991, I believe.

Q. Do you recall whether any other companies have ever tried to sell their products on the basis of alcohol strength?

A. Yes, a number of them.

Q. And were these companies also violating the FAA Act?

A. Well, we believed they were, yes.

Q. Have you heard of a company called "Olympia"?

A. Yes, I have.

Q. And do you recall whether they ever violated the FAA Act?

[46] A. Some years ago—I believe it was 1981, 1982, sometime like that—we believed they were violating the FAA Act and told them to stop. What they were doing is had billboards painted on the side of their trucks or attached to side of their trucks that said, "Powered by Oly"; and it showed starbursts and explosions and things of

that nature. And we believed that that was a violation of the strength prohibitions under the FAA.

Q. And ATF did take action with regard to this behavior?

A. We sought their compliance, and they agreed to stop doing that, yes.

\* \* \* \* \*

[51] Q. I think before we left for lunch, Mr. Cates, you were about to tell us about the TV and radio ads for St. Ides. So if you could please tell us what it was about those ads that was problematic, that would be appreciated.

A. During the course of our investigation of the St. Ides issue, we ran across several radio and television commercials that we found touting the strength of their product and disparaging competitors' products. Some examples of the advertising—advertisements were that St. Ides would put hair on your chest, you could get your girl in the mood quicker, get your jimmy thicker, take a 40 ounce to the head and get a buzz [52] on, things of that nature. Those issues dealt specifically with the strength issue.

The disparagement issues were also part of that settlement, but they were—they were taking on their competitors' products and saying things like their beer tastes like battery acid and makes you throw up and have diarrhea and things of that nature.

Q. So it was this that the settlement, the offer and compromise, addressed?

A. The offer and compromise and the suspension, yes.

Q. Moving on to Heileman, do you recall whether any actions were ever taken with regard to Heileman products by ATF?

A. Well, several actions were taken with Heileman. Beginning—beginning, I suppose, as early as 1981 is the

first one that I was personally involved in, and that dealt with the phrase "dynamite," "dynamite taste." That was a popular phrase back in the early 80's. Everything was "dynamite"; and Heileman came in and asked if they could use that sort of phraseology in their advertising. And at first, we objected, saying that obviously in our opinion it connoted some sort of strength. But through some negotiations, again, which I was involved in, we decided to permit Heileman to use the phrase "dynamite" as long as it was juxtaposed to the word "taste" or somehow, you know, went to the word "taste." We weren't going to allow Heileman to advertise its product as being "dynamite," but we would [53] permit them to say something like "dynamite taste."

Q. Did Heileman stick to this agreement, or did they ever violate it?

A. No, they didn't stick to it.

Q. What did they do?

A. I don't—I don't remember exactly how long a time frame after our agreement, but they—they immediately went out with an advertisement that had lightning bolts and things like that and "dynamite" with explosions all around it and all that.

THE COURT: Could I just clarify? Did this relate to a malt liquor, rather than to a premium or other type beer?

THE WITNESS: Yes. It was Colt 45.

THE COURT: Colt 45. Thank you.

BY MS. ROSENBAUM:

Q. Was this action subsequently stopped by ATF?

A. Yes, it was.

Q. Did Heileman have any other violations? Did Heileman ever try to advertise again on the basis of alcohol strength after ATF took this action against the Heileman advertisement for Colt 45?



A. Well, Heileman has had a number of products which they attempted to advertise strength on, the Colt 45 being the first and the last one being PyroMaster [sic]. Obviously in between, there was the Mickey's Tower of power, I think was the one that they advertised.

[54] Q. "Mickey's" the name of the product?

A. Yes.

Q. And "Tower of Power" was the objectionable advertisement?

A. It was the reference to its strength, yes.

Q. Do you remember when this was?

A. The Mickey's Tower of Power, no, I don't; although I do remember that it was between — between the first episode and the last one.

Q. Would it refresh your memory to take a look at the memorandum that was signed by ATF on this?

A. Yes.

Q. Okay. That would be Exhibit AC.

A. Okay.

Q. After looking at Exhibit AC, do you recall when the action was taken against Heileman for Mickey's Tower of Power?

A. Our letter to them is dated November 21 of 1984.

Q. After these two episodes in 1981 and again in 1984 with two different products, I think you just had mentioned that there was a third episode with yet another product. Can you tell us about the PowerMaster episode?

A. Yes. The label "PowerMaster" was approved for Heileman Brewing Company. ATF approved that label in error. Upon a subsequent internal review, we found — we found the label, looked at it, and said to ourselves right away, "Wait a minute. This label is in violation of the law. It references strengths."

[55] So we took action to cancel that label. We can-

celed the label in July, I believe, of 1991.

Q. Do you recall —

THE COURT: Just tell me what the name was again.

THE WITNESS: PowerMaster.

THE COURT: Okay.

BY MS. ROSENBAUM:

Q. Do you recall whether the product PowerMaster — do you recall how you knew that it was being sold on the basis of strength?

A. Yes. We had obtained an internal memorandum, internal sales memorandum from the Heileman Brewing Company to its distributors that spoke to it being the new up-strength — up-strength malt liquor that would be able to compete with the other so-called "up-strength" malt liquors.

Q. And you just said that ATF took action against this in the summer of 1991; is that correct?

A. Yes. We canceled the label, and ultimately the product was withdrawn from the marketplace.

Q. Moving to a product calleed Old English 800, have you heard of this product before?

A. Yes, I have.

Q. And did Old English 800 — was that ever marketed on the basis of strength?

A. Yes, constantly.

\* \* \* \* \*

[58] Q. Do you recall whether the Stroh Brewery Company ever sold any products on the basis of alcohol strength?

A. Yes.

Q. And could you tell us about those products?

A. The predominant product that employed the strength connotation was the Schlitz Red Bull.



Q. Was any action — what were the slogans that Schlitz Red Bull was sold on?

A. It seems that they also used the "It's the power," "It's the real power," somehow differentiating that from ordinary power.

Q. Would it help you to take a look at a letter that was sent out to Stroh's about this behavior and this campaign?

A. Yes.

Q. That is Exhibit AK.

A. Okay.

Q. Do you recall what the slogans were that Red Bull was being marketed on?

A. Well, in our letter to them of July 19, we say that they had—they ran a television commercial, wherein several times [59] throughout the commercial the words "power" and "strength" are used to describe the product.

Q. And what action did ATF ultimately take regarding the use of these slogans and these words connoting alcohol strength?

A. We asked them also to cease and desist this kind of advertising.

Q. Did Stroh agree to stop this advertising?

A. Yes, they did.

\* \* \* \* \*

[60] Q. Are you aware of any other ways of receiving — of any ways of receiving alcohol content information for malt beverage products, any ways that the public might be able to receive alcohol content information on malt beverages?

A. Sure. A consumer can call us. We have the information on most malt beverage products.

Q. Would you give that information out to a consumer who called and asked?

A. Absolutely.

Additionally, generally what we do when a consumer calls is to—or when a consumer asks us to ask what the particular alcohol strengths of a particular product are, we refer them to the manufacturer.

Q. So you tell them to call the manufacturer?

A. Sure, yes.

\* \* \* \* \*

Q. Can alcohol content information be published in the newspaper?

[61] A. Yes.

Q. Can it be given to the media?

A. Yes.

Q. Have you ever—has ATF ever published alcohol content information?

A. Not that I'm aware of. There is an ongoing study that I started approximately one year ago to determine the alcoholic strengths—the alcohol strengths of all malt beverage products in the United States and to cause that to be published when the study is complete.

Q. So it will be published?

A. Yes.

\* \* \* \* \*

#### CROSS-EXAMINATION

BY MR. OADE:

Q. Good afternoon, Mr. Cates.

A. Good afternoon, sir.

Q. I want to talk about these enforcement actions that you've testified about here today. Would it be true that all these products you've been talking about like Mickey's, Silver Thunder, PowerMaster, Old English 800, St. Ides—those products are all what we call "malt liquors," aren't they?

A. That's correct.

[62] Q. And a malt liquor is labeled as such out there in the marketplace, isn't it?

A. Yes.

Q. Are you aware, Mr. Cates, that malt liquors only have a total of 3 percent of the malt beverage market in this country?

A. Yes, I'm aware of that.

Q. Okay. And it is true that the consumer is generally aware that malt liquors have more alcohol content than, let's call them, beers.

MRS. ROSENBAUM: Objection. Calls for speculation.

MR. OADE: If he knows.

THE COURT: If he has some knowledge or has done a study or is able to answer the question, he may do so.

THE WITNESS: I'm aware that the—that the alcohol content of malt liquors is generally known to be higher in those communities in which the malt liquor—malt liquors are directed to.

BY MR. OADE:

Q. Now, outside of this 3 percent of the market that we've been talking about the malt liquors, have you in your memory, aside with the matters with Coors that we're going to talk about in a minute—have you ever seen mainstream beer use these descriptive words like "strength," "dynamite," "rolling thunder," appealing to alcohol strength? Have you ever seen that?

A. Other than the one I've just testified about, the Miller [63] Brewing Company's Lowenbrau.

Q. The what product?

A. Lowenbrau by Miller Brewing Company.

Q. When did that occur?

A. Just recently.

Q. And what was that about?

A. It was the "strong character" advertisement for—that referred to—that was about Lowenbrau. We asked Miller Brewing Company to cease that.

Q. And Lowenbrau is called a super premium; is that correct?

A. Yes.

Q. It's toward the heavier end of the alcohol market or the malt beverage market?

A. No, not necessarily, sir.

Q. Okay. Well, what you're saying is—and I just want to see if I'm right, here—that all of the instances you've talked about with the—with the use of these descriptive terms that tout alcohol strength—they all deal with malt liquors except the Lowenbrau?

A. Except the Lowenbrau and the Coors matter, yes.

Q. All right. If the use of these descriptive statements to tout alcohol strength were commonly outside the malt liquor market, the 3 percent of the market dealing with malt liquors, you'd be aware of it, wouldn't you?

A. Yes.

[64] Q. Okay. Now, let's talk about the ATF's enforcement in this malt liquor category. Let's start with Stroh's product. What's the name of that product again?

A. The Red Bull.

Q. The Red Bull. Okay. They were using the slogan "It's the power"; correct?

A. "It's the power" and "the real power."

Q. And this happened when?

A. It happened before. It was an ongoing series of advertisements that ceased in 1991.

Q. And you took enforcement action in 1991, didn't you?

A. That's correct.

Q. And you took enforcement action, I believe, under 27 C.F.R. Section 7.54(c); is that correct?

A. That's the regulation, yes.

Q. Yes. And that regulation forbids brewers from referring to alcohol strength through the use of descriptive statements; correct?

A. That's correct.

Q. All right. And in 1991, there was an injunction in effect from this court, wasn't there?

A. To what effect, sir?

Q. Well, were you aware that this court had enjoined the ATF in 1989 from enforcing your regulations insofar as they prevented accurate disclosures of alcohol content to consumers?

[65] MS. ROSENBAUM: Object to the characterization.

THE COURT: Perhaps—and I don't know if I have it in front of me—perhaps you can be more explicit on what the actual order was.

MR. OADE: I can do that, your Honor.

BY MR. OADE:

Q. Mr. Cates, I will hand you a copy of this court's order dated May 31, 1989, and ask you to review it; and then I'll ask you if you were aware of it.

A. Okay.

Q. Have you had a chance to review this court's order dated May 31, 1989?

A. I have.

\* \* \* \* \*

Q. Mr. Cates, the only point I'm trying to make here is that during 1990 and 1991, the ATF was taking enforcement action [66] against these brewers in the malt liquor segment of the industry using descriptive statements, and that was while this court's injunction was in effect; and this lawsuit had no effect whatsoever on your ability to enforce. Would you agree with that statement?

A. Yes.

MR. OADE: All right. Thank you. That's the only point I wanted to make, and I'll ask for the order back now.

THE COURT: All right.

BY MR. OADE:

Q. You are aware, then, Mr. Cates, that Coors in this lawsuit does not challenge the regulation at 27 C.F.R. 7.54(c) with respect to descriptive statements?

A. I understand what you're saying. I don't see the distinction; but I understand what you're saying, sir.

Q. Now, with respect to Stroh, "the real power," you sent some letters to Stroh objecting to the use of "the real power"; and they withdrew that phrase. Is that correct?

A. That's correct.

Q. Let's talk about Old English 800 for a minute. Old English 800 used the phrase, quote, "It's the power," or quote, "the power." Correct?

A. Yes, sir.

Q. And again, ATF wrote some letters objecting to the use of that phrase because it violated the regulation that [67] prohibits brewers from using descriptive labels to tout strength; correct?

A. That's correct.

Q. And as a result of your letters, Old English 800 stopped using the phrase "It's the power"; correct?

A. Yes, sir.

Q. Okay. Let's talk about St. Ides.

St. Ides was using a variety of marketing practices that touted the alcohol strength of their malt liquor; correct?

A. Yes.

Q. And I think that you indicated those marketing practices did include an example where they actually put the alcohol content on either an ad or a label; is that correct?



A. In an ad, yes, sir.

Q. And that alcohol—the statement of alcohol content in that ad was associated with the statement, quote, “No. 1 strongest malt,” unquote; is that correct?

A. That’s correct.

Q. So it wasn’t that St. Ides was just putting the alcohol content in an ad; it was putting the alcohol content in and then touting the strength; correct?

A. Both appeared in the same ad, yes, sir.

Q. Okay. And again, ATF wrote St. Ides a series of letters telling them that they were in violation of existing law, including the law that prohibits use of descriptive statements [68] to tout strength; correct?

A. That’s correct.

Q. And as a result of that, without having to resort to any judicial forum, you got an agreement with St. Ides for them to stop these practices; correct?

A. Ultimately, yes.

Q. Okay. Let’s talk about PowerMaster. PowerMaster is a Heileman product; correct?

A. Yes, it is.

Q. And PowerMaster was actually the name of the product; correct?

A. That’s correct.

Q. It was a malt liquor?

A. That’s correct.

Q. Okay. And Heileman is the same one that makes the Colt 45 malt liquor; correct?

A. That’s correct.

Q. So Heileman wanted to introduce a new malt liquor called PowerMaster, and they submitted the label to ATF for approval; is that correct?

A. Yes.

Q. Now, the reason Heileman submitted its label for

approval to the ATF is because they’re required to do that by law, aren’t they?

A. That’s correct.

[69] Q. In other words, if a brewer wants a label approved, the agency has to approve it, doesn’t it?

A. We have to approve the label, yes.

Q. And ATF approved “PowerMaster”?

A. That’s correct.

Q. And then ATF subsequently thought that “PowerMaster” was a reference to product strength; correct?

A. That’s correct.

Q. So after approving the label, you went to Heileman, you told them that you thought they were in violation of the regulation that prohibits the use of descriptive words to tout strength; correct?

A. Yes.

Q. Okay. And as a result of you writing these letters, Heileman withdrew this product from the market, didn’t they?

A. As a result of a meeting we had with them, yes.

Q. Okay. And they had—you let them use up their existing inventory, I understand?

A. Yes.

Q. But it’s off the market, isn’t it?

A. Yes.

Q. Now, Mr. Cates, do you believe that the ATF is able to effectively regulate against these types of abuses we’ve been talking about in the malt liquor segment of the market?

A. Yes, I do.

[70] Q. And you’ve shown that, haven’t you?

A. I believe we have.

Q. Okay. And that’s been going on, if you look at the dates of these enforcement actions, for the last two or

three years, isn't it, and before that?

A. Yes.

Q. Now, Mr. Cates, when you were — You were chief of the enforcement or compliance division; is that correct?

A. That's correct.

Q. Did that also include the wines and distilled spirits section of the department?

A. Yes, it did.

Q. Now, wines and distilled spirits are required to disclose alcohol content; is that correct?

A. That's correct.

MS. ROSENBAUM: Objection. Relevance.

THE COURT: The objection is overruled. He may answer.

THE WITNESS: That's correct.

BY MR. OADE:

Q. And you heard my opening statement, where I was asked a question by the Court as to how that was done; correct?

A. Yes.

Q. Distilled spirits are disclosed through proof; is that correct?

A. Yes.

[71] Q. And wines are disclosed through alcohol content by volume?

A. Yes, as are distilled spirits, too, by the way.

Q. Distilled spirits, it's my understanding within the last few years — distilled spirits are now required in addition to showing proof — they're required to show alcohol content by volume?

A. That's correct.

Q. Is that because the alcohol content by volume is deemed to be more meaningful information to consumers than proof?

A. Yes.

Q. Was that an ATF initiative, if you know?

A. I'm not sure.

Q. Okay. Now, there is also a regulation of the ATF that prohibits distillers and wineries from marketing their product based on strength; is that correct?

A. There is for wineries, yes.

Q. Okay. And has the ATF been able to enforce those regulations that prohibit wines from being marketed based on appeals to alcohol strength?

A. Yes.

Q. And have you been able to effectively enforce those regulations?

A. We believe so.

q. All right. Let's suppose a particular winery was very clever and they wanted to use the disclosure of percent alcohol [72] by volume in a manner to tout the alcohol strength of their product. Would you be able to detect that?

MS. ROSENBAUM: Objection. Calls for speculation.

THE COURT: The objection is overruled. He may answer.

THE WITNESS: Yes, sir. We have.

BY MR. OADE:

Q. Okay. In other words, you would look at the advertising as a whole, you would look at the way this information is being used as a whole, and make a judgment as to whether or not alcohol strength is what's being promoted here; correct?

A. That's correct.

Q. And you've been able to do that with wines and spirits?

A. With wines, yes.

Q. Okay. And in the malt liquor segment, you're able to do that — I mean you know when a brewer is marketing alcohol strength, don't you?

A. Yes.

Q. Okay. And you're capable, the ATF is capable, of determining when a brewer is promoting alcohol strength and feels capable of taking enforcement action against that, don't you?

A. Yes, we do.

\* \* \* \* \*

[75] Q. Okay. I just have a few more questions, Mr. Cates.

How long did you say you've been at ATF?

A. I've been employed by ATF since January, 1971.

Q. And how many years of that has been spent in alcohol enforcement under the Federal Alcohol Administration Act?

A. With the exception of about two and a half years, the majority of my work has been involved in alcohol enforcement.

Q. How many years experience do you think you have in alcohol [76] enforcement?

A. I came to Washington in 1981 and specialized in alcohol enforcement under the FAA Act from 1981 till now, with the exception of two years, two and a half years.

Q. So it's been about eight, nine years of enforcement?

A. Under the FAA Act, of specialized enforcement, yes.

\* \* \* \* \*

[83] DIRECT EXAMINATION

BY MR. OADE:

Q. Dr. Patino, what is your current position with the Coors Brewing Company?

A. I'm the director for brewery research and development department.

Q. Does research and development—could you just give us a brief summary of what that means when you say "research and development"?

A. Yes. We do research starting from our raw ingredients, such as barley, hops, all the way through the process including the malting, the brewing, the fermenting, aging, filtration processes; and then we go further into the new product development in cooperation with the marketing research department, and finally the sensory or flavor research.

\* \* \* \* \*

[84] Q. And is Exhibit 6 a summary of your education, your work experience, and your publications?

A. That's correct.

Q. Okay. It says you have a doctorate in chemical engineering; is that correct?

A. That's correct.

Q. Would it be fair to characterize your current field as brewing chemistry?

A. Brewing chemistry in its broadest sense, yes. That would be accurate.

Q. Now, as a brewing chemist, Dr. Patino, do you attend professional seminars and conventions and that type of thing?

A. Absolutely. It's part of—part of my job description. I'm [85] responsible to be up to date on any technology developments and what have you, so I have to be up to date. And in addition to that, from the record, you will see that we're—I've been active in the actual presenting and publishing of papers in the brewing field.

Q. Okay. Now, I want to talk for a moment about the type of research that you do at Coors on taste and sensory



characteristics of the product. Could you describe generally what type of research you do into product attributes like taste?

A. Yes. We at Coors have a number of flavor panels that each one looks at a different aspect of the sensory—of our products, the sensory attributes of our products.

For instance, we have one expert panel that does nothing but try to distinguish differences between two products. We have another one that dedicates itself to establishing in what way are these beers different by analyzing different flavor intensities.

There is another panel that does nothing but to look at the acceptability of the product, no matter for what reason, simply the acceptability of it. And then the ultimate is taking it to consumers.

So there is again jointly, with marketing research—we have assessment forms, questionnaires that are given to consumers when samples or products are provided to evaluate their acceptance.

[86] Q. Now, does this taste testing in these panels—are they maintained on an ongoing basis?

A. Oh, yes. On a daily basis, they all meet. The exception obviously is a consumer panels. Those take place on an as-needed basis.

Q. Does this research include the types of product characteristics that appeal to consumers and is the reason why they might buy a particular product?

A. Absolutely. We ask them overall, "How do you like it?" That's what we call the "hedonic scale." But in addition to that, we have a relatively long list of attributes where we try to pin them down as to why they like it or didn't like it, such as bitter, harsh, sweet, astringent, malty, and so on.

Q. Okay. Does your testing include blind testing?

A. Yes. In all of them and all of the panels I described—and to a great extent, they are blind test taste tests, because the panelists are not told what the test is about. And the internal panelists programs, in some of them we tell them what beer type it is; but in consumer testing, you typically don't tell them anything. All they know is that one product has—is No. 231 and the next one is 456. There is a questionnaire that is presented previous to that; but other than that, they are not told what they are testing.

Q. Would you describe the things that affect the taste of a given malt beverage? What affects product taste?

[87] A. You mean the factors that contribute to different tastes? Gee.

Q. Yes, just in summary.

A. In a very abbreviated explanation, what you have is an overall balance that you need to achieve; and that balance comes from several key elements. One of them is a sweetness which comes from the residual sugar that was left unfermented. One is from the level of alcohol, and one is from the bitterness or the hops—the amount of hops that are used.

If any of the three are taken by themselves, they would create an imbalance in the product resulting in a lower acceptability of it.

Q. Let's suppose, Dr. Patino, that a brewer was selling a beer at an alcohol content of 3.5 percent alcohol.

A. Okay.

Q. And let's suppose the brewer wanted to raise the alcohol content of that product, for whatever reason, from 3.5 percent to 3.7 percent or 4 percent. Would a brewer be able to do that from the standpoint of the brewing process?

A. Technically, yes, we would be able to do it without any trouble.

Q. Would a brewer be able to do that without adversely affecting the product itself?

A. No.

Q. Would you explain why not?

A. We ran a study earlier this year where the level of alcohol [88] in a Coors product was raised from 3.5 to 3.7, a very marginal increase. And what was seen was that one attribute that we were investigating, which is called "smoothness," was not impacted, as some people believed it would. It didn't make the product smoother. What was very disturbing at the same time was the fact that it became what the sensory experts would call a very polarizing attribute, and what that meant was the following: that about one-third of those consumers said, "I like the product better," about one-third said, "I like it now less," and about one-third were ambivalent.

If you were to change an established brand, it would be extremely dangerous for you to do so under these circumstances; and the reason why is that obviously you're alienating about one-third of your consumers.

So yes, if you say what would you like to have seen if the overall goal was no flavor change is that you wouldn't have had this polarity develop; that either everybody liked it or everybody disliked it or everybody was ambivalent.

Q. It is technically possible to raise the alcohol content of any malt beverage without changing flavor or other product characteristics at the same time?

A. Unless you're talking extremely small amounts, the answer would be no. You would change the taste as you change the alcohol level.

Q. And when you say, "very small amounts," what are you [89] talking about? What is a very small amount?

A. 0.1 percent, perhaps .05. That's within the process capability, as we call it, just how accurate can your ana-

lytical instruments and your process controls get.

Q. I want to talk about alcohol itself for a minute as a product of beer or malt beverages. How is alcohol itself perceived or—"perceived" is a bad word. What are the flavor and taste characteristics of alcohol? Can you explain that?

A. When we taste food, we use several senses; and of course one is the aroma; so by smell, we detect differences. By our tongue, by our taste, we also tell differences.

There is a third attribute called sensation, which is neither of the two, the first two. And what that talks about is just sensations, tingling, numbness, those sorts of things.

In the case of alcohol, that is perhaps the one—the one characteristic that affects all three. Several chemical compounds that you will find in beer will affect only either the aroma or the flavor or the sensation but not necessarily all of the three.

So alcohol, again, becomes a vital part of defining what the product characteristics are.

Q. What would happen to a particular product if a brewer wanted to raise the alcohol content from, say, 3.5 percent to 4 percent—How would that affect the product itself—and left everything else the same?

[90] A. Leave everything else the same, but increase the alcohol?

Q. Yes. How would that affect the product?

A. Again, it would create an imbalance. The exact words the consumers may use will be different and the actual describing of these terms is still something that different areas of the country do it a little bit different; so I would be—it would be difficult for me to give you a precise answer on it would make it more like this or more like that. I would feel that that would be generalizing a lit-



tle bit too much. Let's just say it would change it. It would create perhaps a greater sensation of some of its attributes and a lessening of others.

Q. Would it affect the product balance?

A. Oh, absolutely, yeah.

Q. Would the effect produced on the product balance in your opinion be favorable, or unfavorable?

A. It would be unfavorable in the sense that it would change the product to what it used to be.

Q. From what it used to be?

A. From what it used to be.

Q. Let's talk for a minute about why consumers drink beer. Do you know the primary reason why consumers drink beer, based on your research? What's the primary product characteristic that consumers like about a beer?

A. They want refreshment, they want an alcohol that is in moderation, so it's a beverage of moderation, if you will. [91] They don't necessarily like the sweetness of pop, and they were not wanting something real heavy, like a wine or a high alcohol drink.

Q. How about taste? What role does the product characteristic of taste have?

A. Well, again, there is the refreshment, the thirst-quenching aspects that have to be part of that product.

Q. Now, you indicated that consumers want moderation with respect to alcohol level. Did you say that?

A. Yeah.

Q. And on what basis do you make that statement?

A. Well, basically, if you look at the trends that the industry is going through, we have been increasing and increasing the lighter beer consumption in the country. In the case of Coors, we're already—almost two-thirds of it is light beer. And again, the industry has a whole—I guess other witnesses can cover it better, but it's been in-

creasing dramatically. The no-alcohol market has been increasing tremendously in the last year.

If you say have the higher alcohol level products been increasing, or is there a great deal of technological effort on creating better high alcohol products worldwide, no. Everybody is struggling to create the very best either no-alcohol or low-alcohol products. And we get to hear that from the technical discussions at our conventions and symposiums.

[92] Q. When is the—

THE COURT: I may have heard him wrong.

Did you say that light beers is two-thirds of the beer that Coors produces?

THE WITNESS: Approximately 60 percent or so, yes.

THE COURT: Go ahead.

BY MR. OADE:

Q. You mentioned a symposium or convention. When is the last time you went to such a symposium or convention?

A. Last September. It was the brewing Congress of the Americas, which is the collection of both technical societies that—well, that oversee our industry, both the Master Brewers Association, as well as the American Society of Brewing Chemists.

Q. There were brewing chemists from all over the world at that convention?

A. That's correct.

Q. And you presented a paper; is that correct?

A. That's correct.

Q. And you exchange views with your colleagues at these conventions?

A. That's correct.

Q. Are you familiar with—you said the trend worldwide is to try and produce a nonalcohol or low-alcohol beer. Is that correct?



[93] A. Yes.

Q. Why is that?

A. Well, let me, if I can pick on one example—I have conversations from two technical directors from Australia just as part of this ongoing exchange of ideas. In any event, one of them—well, both of them told me that the biggest growth for their industry right now was in the low-alcohol beer market, and that was anywhere between 1 to 2½ or so percent alcohol by weight. In those countries, the level of alcohol is on the label, and that's the category that apparently is growing the fastest and that they're the most excited about. So that's just one example.

Q. You're saying that in Australia, the alcohol content of the product is shown on the label?

A. That's correct.

Q. What is the relationship between the alcohol content of a malt beverage and the amount of calories in that malt beverage attributed to alcohol? And I'll refer you in that regard to Exhibits 5—4 and 5 and I'll ask you to comment upon those exhibits and answer my questions with respect to those exhibits.

A. Yes. Thank you.

What these two graphs show is essentially the result of an experiment where we took alcohol and we added alcohol to pure water. After additions of these 5 different levels, we ran those samples through the laboratory to determine the [94] amount of alcohol that was in those solutions as well as the amount of calories. And as you can see, as you increase alcohol, you increase calories. And there is a one-to-one linear relationship, taking you from, say, about 20 calories for a 1 percent to 110 or so for a 4½ percent by weight.

Q. Is calories something that consumers are looking for in a malt beverage, or something they generally want to avoid?

A. It's something that they would like to avoid based on the current trends; and again, that is substantiated by the growth of that particular segment of the industry.

Q. If you could produce a product hypothetically, a malt beverage that would taste exactly like, say, a Coors Extra Gold, the same taste, the same sensation, the same body, the same color, and had zero alcohol in it, would it be a successful product?

A. I don't know if it would be a successful product. All I know is that that would be impossible to achieve, because alcohol—as soon as you introduce alcohol into the product, it will give you calories.

Q. Let's suppose you could achieve it. Would it sell?

A. Oh, yeah. I'm pretty sure it would.

Q. Are you familiar with the malt liquor segment of the industry?

A. Some.

Q. Do you know based on your research if malt liquor drinkers [95] have different taste preferences than drinkers of light, regular, premium beers?

A. Yes. As part of these ongoing consumer panels—is just fascinating. An if you present an array of products to those consumers and you pre-screen them to know if they are predominantly either light beer drinkers vs., say, malt liquor or super premium type drinkers and you ask them to rate acceptability and many or attributes of those products, that's something that we've done and has been a fairly long array of products. What you end up finding is that the consumers that like the lighter beers like the lighter beers as a whole. In other words, all of the light beers were rated high, some higher than others, but higher as a group by a long shot compared to how they rated all of these other heavier type beers.

If you ask how did the other group of consumers do

with the same test, the same samples, it was exactly the opposite. So consumers of malt liquors, super premiums, and so on, would take—would tend to look for attributes that are fairly different from what a light beer consumer would.

Q. Does in your opinion—do the malt liquors have a distinctly different taste than other mainstream products, malt beverages?

A. Yes.

Q. How would you describe the taste of, for example, Old English 800, which is the leading up-strength malt liquor?

[96] A. Instead of picking a specific example, I would like to say as a category, they tend to be more bitter, more sweet, fuller bodies, thicker in general. In other words, more of just about everything. All of these flavor intensities would tend to be higher overall again compared to the light beer.

Q. And is that because you can't just increase alcohol strength without affecting these other taste characteristics?

A. That's correct. Essentially—if you say essentially how do you design a new product, you have to strike that balance of sweetness, bitterness, and alcohol level.

Take, for instance, a light beer. A light beer will have in an analytical scale of bitterness—will have a value of about 11 or so. Malt liquor will have some bitterness intensity in the 20's; in other words, almost double, but they won't taste—the higher alcohol products won't taste terribly bitter because along with the increase in bitterness came an increase in sweetness from unfermented sugar, as well as an increase in alcohol.

Q. We had a witness in this case, a Mr. Hugh Nelson of Heileman, who described the taste of Old English 800

as quote, "nasty," unquote. Have you ever tasted that product?

A. I have tasted that product.

Q. What do you think it tastes like?

A. I wouldn't buy it personally; but again, it is an issue of balance. It's just—it doesn't have the balance that I would [97] like as a consumer to see.

Q. Are you familiar with the Coors product Extra Gold?

A. Yes.

Q. What are the product characteristics of Extra Gold that appeals to consumers, if you know?

A. It would be along the areas of fuller body, a darker color, fuller flavor. Relative to what? Relative to regular Coors.

Q. Could Coors or any other brewers, if they wanted to, respond to a perceived consumer demand for more alcohol content in a beer, assuming there were such a demand, just by raising the alcohol content of existing products? Would a brewer do that?

A. Oh, yes. We all use these days what is called "high gravity brewing"; and as a result of that process, the alcohol level in your completed or finished brew is higher than your final beer; and so you can adjust it easily that way.

Q. Please listen to my question.

A. Okay.

Q. You have a range of existing products like Coors Light, Coors Extra Gold, or Bud Light, or whatever.

A. Okay.

Q. Let's suppose Budweiser or Coors wanted to raise the alcohol content of its product to respond to some perceived consumer demand here for higher alcohol like the Government says. Would a brewer do that? Would it make sense?



[98] A. No, it wouldn't, again based on the studies that would show that even a modest increase in alcohol level would change the product characteristics. And so if you're already either taking the product off balance or you are alienating a segment of your consumers by changing the flavor of the product, or if you try to manipulate now and restore balance by adding more sweetness and therefore more calories to the product, you essentially have totally changed the profile that you started with. And therefore, you no longer have that product that the consumer used to buy.

Q. Now, you indicated previously that you were familiar with brewing practices in other countries. Is that correct?

A. That's correct.

Q. Are you familiar with the labeling laws in, say, Canada and Australia and the United Kingdom?

A. I don't know about the laws. All I know is that I have seen samples repeatedly, and the labels include the alcohol percent in those instances.

Q. When you're saying samples, what do you mean?

A. Samples. Finished product, of the beers coming in.

Q. So you've seen product labels for Canada?

A. Oh, yes. Again, we are an international brewery or brewer, and our product is brewed in Canada, in Japan, in the UK; and just as a result of our quality assurance measures, if you will, we have to not only look at them from a chemistry standpoint, [99] we also look at them from a flavor standpoint. But we receive packages, ordinary packages at random; and they do contain the labels showing percent alcohol.

Q. Are you aware of any efforts in those countries that we've mentioned that have disclosure laws, efforts by brewers to simply raise the alcohol content of their prod-

duct or any evidence of a so-called "alcohol strength marketing wars" in any of the countries that we've been talking about?

A. No. In none of them at all. In fact, again, the trend is in the opposite way.

Q. And on what do you base your statement that you haven't seen any evidence of this? How do you know that that's not happening in, say, Canada, or Australia, or the United Kingdom?

A. Again, as part of my job to be up to date on what's happening, I review the trade journals, I talk to the technical directors of other breweries. We exchange views on technologies that are emerging. And they are all concentrating on how we can make a better lower alcohol product or a no-alcohol product. My counterpart from one of the breweries from Australia was extremely excited about the low alcohol beer simply because of its implications in the alcohol levels in blood and how much could consumers couple before being impaired and that sort of a thing. So, you know, all of these things through these various means.

Q. Dr. Patino, in your opinion, if, in this country, the [100] percentage alcohol content of the product was shown on product labels or were simply stated as a factual matter in product ads, would that in your opinion cause brewers to raise the alcohol content of their product or engage in any type of alcohol strength war?

A. No, I don't believe it would.

\* \* \* \* \*

[102] Q. Do you have an opinion, Dr. Patino, based on your experiences, whether the alcohol disclosure laws in these other countries we've talked about have resulted in any alcohol beer wars or the product being sold based on strength?



MS. RUSSOTTO: Your Honor, we object to that question. [103] Mr. Patino has indicated that he's not aware of the actual laws of other countries. We don't believe that he has any particular knowledge or expertise regarding foreign law. He can testify regarding what the practices of the brewers in foreign countries are, not regarding what the legal requirements are.

MR. OADE: I'm not asking him what the law is, your Honor. I'm asking him what brewers are doing in those countries that we all know have labeling. It's already in evidence which countries have labeling.

THE COURT: Well, I'm not sure that that's even really an opinion question. You're asking him what he knows of what brewers are doing in other countries, what he has observed or learned at the conferences? He may answer that.

BY MR. OADE:

Q. Go ahead, Dr. Patino.

A. Thank you.

Just to perhaps help illustrate where in addition to just technical verbal exchange—where I get information, as a clear example would be trade journals. Specifically there is one called, "Brau Welt International." It's a regular publication that comes from Germany and is in English; and it reviews on a regular basis the trends—not trends per se, but it just talks about news in the brewing world. And it goes country by country. And that very document, I reviewed last [104] week; so it's something again that have I to do as part of my job.

In any event, from all of these sources, I just don't see any evidence that would indicate that in any of these countries there is any swing or move toward a higher alcohol content in any of these malt beverages.

Q. As a result of product labeling?

A. Yeah, exactly.

MR. OADE: If I may have a moment, your Honor.

THE COURT: Go ahead.

MR. OADE: That's all the questions we have, your Honor.

#### EXAMINATION

BY THE COURT:

Q. Could I clarify one thing? I thought I heard you testify that Coors brews in Canada, England, and Japan?

A. Under license, your Honor, like the Molson Breweries of Canada brew Coors and Coors Light under license. It's our label, our process, our yeast.

Q. Does the label, when they brew it, have the alcohol content on it?

A. That's correct, ma'am, yes.

Q. So it says, "Coors." It's just for Canada and it has the alcohol content on it?

A. That's correct, yes. Similarly for Japan, by the way, [105] other countries.

Q. Let me ask you one more question before cross. There always used to be conversation about 3.2 beer and 6 percent beer and the fact that you could get 3.2 beer in the supermarkets but not the 6 percent beer. Can you explain to me anything that would help me understand those common ways of thinking? Maybe that is not the way it is anymore; but I remember hearing people say, "Well, I'll be able to get beer at Safeway, but it's only 3.2 beer."

A. That's correct. In a few states—Mr. Rechholtz would be better at this in specifics; but in some states, specifically Colorado, one of them, the final product that is sold in something like a supermarket would be adjusted to be no more than 3.2 percent by weight.

So if you say what is that 3.2 Coors in a supermarket,

it's a Coors product that has its alcohol adjusted to 3.2 percent by weight.

The Coors product you would get at the liquor store would have been, then, Coors product adjusted to an alcohol level of 3.55 percent by weight.

If you say, "Well, give me another example," that would be Extra Gold. If you say it's an Extra Gold with—an Extra Gold 3.2 would be again Extra Gold adjusted to 3.2 percent alcohol by weight, whereas its counterpart from the liquor store would be Extra Gold but with a final alcohol of [106] approximately 3.9 percent; so it doesn't tell you what the others are; it only tells you that the one that has been labeled as 3.2 has that alcohol level as its limit. And it can be sold, then, in some of these other retail accounts where they don't have a license to sell the the other higher alcohol levels.

Q. From what you just told me, the taste differs depending on the alcohol content?

A. That's correct. That's a good point.

Q. Can you tell me if the 3.2 beer in Safeway tastes different than the 3.5 in the liquor store?

A. Yes, it's going to take slightly different. It's going to be a little blander, not as strong or as well balanced. It is my opinion it is not a well balanced product.

Q. Which one is not well balanced?

A. The 3.2 as compared to the 3.5. Why? Because it was formulated to be 3.5 as it's sold in the, very great majority of the country. So it's a problem that in those very few states we still have to deal with.

\* \* \* \* \*

[107] THE COURT: Thank you.

(The Court was in recess from 3:25 till 3:45 p.m., and when reconvened, the following proceedings were had and entered of record:)

MR. OADE: Your Honor, during the break, I have had a chance to get out my file on the regulations; and if now is an appropriate time, I'll be glad to clarify the regulations we're challenging.

THE COURT: Okay. I just want to be clear which one you were distinguishing from 7.54(c).

MR. OADE: Okay. If you'll look at 7.54(c), we do not challenge the first statement that occurs there. It reads, "Advertisements shall not contain the word strong, full strength, extra strength, high test, high proof, full alcohol strength." That is unchallenged in this case by Coors, your Honor.

But we do challenge starting with the statement, "or any other statement of alcohol content or any statement of the percentage and quantity of the original extract or any numerals, letters, or characters, or figures—" We do challenge that. And what we are saying is you can prohibit words or statements that are descriptive, but you cannot prohibit pure factual disclosures.

THE COURT: Okay. So there isn't another section that you're referring to.

[108] MR. OADE: There is another section that deals with advertising that we're challenging, and that is 7.29(g). 7.54(c), and then 7.29(g) has a similar provision, "Use of numerals: Labels shall not contain any statements, design, or devices whatever, whether in the form of numerals, letters, characters, figures, or otherwise which are likely to be considered statements of alcohol content."

So we challenge 7.29(g).

THE COURT: All right. Thank you.

MR. OADE: I do have, your Honor, one further area of testimony for Mr. Patino before I sit down; and it will be very brief.

THE COURT: Dr. Patino, do you want to take the



stand again, please. Understand you're still under oath.

THE WITNESS: Yes, ma'am.

THE COURT: And you have a couple more questions before cross-examination, you said.

**DIRECT EXAMINATION (continued)**

BY MR. OADE:

Q. Dr. Patino, you are familiar with the brewing process; is that correct?

A. That's correct.

Q. Are there any differences between the brewing processes used in 1935 and the brewing processes used for malt beverages today?

[109] A. There sure are. They're basically in several ways: the raw ingredients that were used at the time, as well as the equipment, the analytical capabilities of laboratories; in other words, specifically, for instance, the precision with which you could measure alcohol levels. It wasn't just nearly as precise as it is today.

Q. How about variations in temperatures in the malt cellar, which Congress was concerned about in 1935. Are there variations in temperature in the malt cellar today?

A. Well, again, although there are still variations, you have computerized controls, much better, more sensitive equipment to produce a real uniform product. See, the key for a brewer is to produce a product that is as uniform as it can be so that the consumer won't see a change from one glass or one package to the other.

And that uniformity comes from understanding better the process but also from the equipment, the instrumentation that is now available.

Q. Dr. Patino, according to the legislative history of the 1935 Federal Alcohol Administration Act, there was a concern that disclosing alcohol content on the label

might be misleading to consumers because there were variations in the alcohol—alcohol product levels depending on how you brewed it today vs. yesterday and depending on the particular brew that it came from. Is that a concern with today's brewing processes?

[110] A. Oh, absolutely not. For one thing, back in those days, they didn't use what we have now, which is higher gravity brew; and now we can adjust those variations later in the process, whereas once they had put in their materials and they had their finished product at the end of aging, that was it. They couldn't really affect the levels nearly as much as we can today.

Similarly, the homogeneity of the barleys they were receiving and therefore the malts that they were receiving was much wider in characteristics than what brewers can do now because of the better understanding but also just the sheer volume. You can mix and blend as you go.

Q. You were also asked some questions by the Court about the alcohol levels of a 3.2 beer sold in a grocery store as opposed to alcohol levels of a 3.2 beer sold in a grocery store as opposed to alcohol levels of a beer sold, say, in a liquor store; and you identified the differences. I'd like to ask you with respect to light beers. Let's take a Coors Light: Is there any difference in alcohol content of a Coors Light between a Coors Light sold in a grocery store at 3.2 percent by weight and a regular Coors Light sold anywhere else?

A. Yes. It's practically insignificant. It's in regular liquor stores—is in the order of 3.25, 3.3 at the most, vs. 3.2. So now you're getting into an area where, yeah, it would be extremely difficult to tell that alcohol difference.

MR. OADE: That's all I have. Thank you.

[111] THE COURT: Cross-examination, please, Ms. Russotto.



## CROSS-EXAMINATION

BY MS. RUSSOTTO:

Q. Good afternoon, Dr. Patino. How are you?

A. Fine, thanks, Pat.

Q. All right. I'd like to follow up on some areas here. Before the break, you were asked about changes in the alcohol content of products that are sold in a grocery store vs. sold in a liquor store. There are differences. That's correct?

A. That's correct.

Q. All right. And so Coors, then, is already selling a single product—for example, let's take Coors—the Coors beer itself. The Coors beer itself might have a different alcohol content depending on if it's sold in a grocery store or sold in a liquor store. Is that correct?

A. In those few states where it's required, yes.

Q. Now, in the states where it is required, the Coors beer that's sold in the grocery store, then—I take it that Coors actually does have some success in selling Coors beers in grocery stores; correct?

A. Actually, we've been disputing just how many-fold those sales are. They're so small that it's really a—just the presence. If you say—and again, Mr. Rechholtz would be better at answering this, but if you say what percentage of the product that we produce is 3.2, my gosh, it's extremely, [112] extremely small; so it's not because it's successful but because you don't want to lose on that market segment or that opportunity.

\* \* \* \* \*

THE WITNESS: In the case of the Coors Banquet Beer, the level will be 3.55 for regular Coors Banquet in the liquor [113] store, 3.2 in the supermarket.

BY MRS. RUSSOTTO:

Q. Now, do you simply reduce the alcohol content of

the beer by blending it down to get to 3.2, or do you try and compensate for it by changing other characteristics? How do you get from the 3.55 to the 3.2 beer that's sold under the same label?

A. Yes. Because of the very limited volume and therefore the minimal impact that it would have on the company, at this time it is produced by blending down the previously formulated product to have a finish alcohol of 3.55 by blending it down further with additional water to 3.2.

If you ask if we—if we saw this as a successful, important segment, would then we brew or change our brewing formulation so that the 3.2 product would be more acceptable or have a better balance, I would say yes, we would have to brew differently, so that now that we have moved the alcohol level to a different point, we ought to adjust some other characteristics. To do so, however, is expensive, it is cumbersome; and that's a business decision, basically.

Q. So at this point, then, you do not adjust the other characteristics of the 3.55 beer to get it down to the—when you blend it down to 3.2?

A. That's correct.

Q. Now, I believe you stated earlier in your testimony that increasing the alcohol content of a beer would also increase [114] the caloric content of the beer. Is that correct?

A. Oh, yes, absolutely.

Q. And that's because the alcohol, the additional alcohol, adds some calories; correct?

A. Correct. To give you an idea, in the case of light beers, the percent of the final calories that come from alcohol is on the order of 75 or so percent, and the remaining comes from the unfermented sugars.

In the case of heavier type beers, that percentage is reduced to about 60 percent.

Q. 60 percent that comes from the ethanol?

A. That's correct.

Q. And so there is more of the caloric content that's going to come from residual sugars?

A. That's correct. And the reason for that is, once more, that if you increase one, you automatically ought to increase the other, which in this case as is residual sugar, so that you try to maintain a certain product balance. That's why then even though you have more alcohol, less of the calories come from alcohol, because you have to leave more sugar in that product, so that again, you tend to establish that balance.

Q. Now, I believe you also said that increased caloric content would be a negative product attribute for most consumers. Is that your understanding?

A. For an important segment of consumers, I would say so, yes.

\* \* \* \* \*

[117] Q. I believe you also said that earlier this year, Coors had conducted some research whereby you increased the alcohol content of one of the Coors products from I think it was 3.5 alcohol by weight to 3.7 alcohol by weight. Is that correct?

A. I believe so.

Q. Which Coors product was that?

A. That was Coors Banquet.

[118] Q. Coors Banquet Beer?

A. Yes.

Q. And I believe that you also stated that you found that one-third of the consumers actually liked the product better with 3.7 percent of alcohol; is that correct?

A. That's correct.

Q. And only one-third of them actually actively disliked the product with higher alcohol; correct?

A. Correct.

Q. Now, I wanted to ask you a few questions about product development. Again, the—Coors might, might it not, introduce a product to appeal to those one-third of consumers that liked the higher alcohol product better. Coors might do that. Correct?

A. It's conceivable, depending on a variety of factors: its potential for growth, its cannibalization, all sorts of other issues that rely more on marketing think the technical folks like me.

Q. But Coors might try to capitalize on the fact that you found that one-third of the consumers like the higher alcohol products better.

MR. OADE: I object, your Honor. She was at pains to [119] note that this witness is not a marketing person.

MS. RUSSOTTO: I'm asking whether Coors might develop a product. I believe if he's allowed to go further, he will testify that his office does develop products.

THE COURT: The objection is overruled.

BY MS. RUSSOTTO:

Q. It is conceivable that Coors might develop a product in order to capital lies on this one-third of consumers that liked the higher alcohol product more. Correct?

A. That's correct. And what you want to do in that case is understand why, what were the product attributes. And there are several ways of looking at the—at this proposition that may or may not end up having a final product that will have a 3.7.

Q. Okay. I understand that. I just wanted to know whether that—thank you. You've answered my question. That's fine.

\* \* \* \* \*

[138] Q. Now, you testified that you cannot raise the alcohol content without affecting the product character-



istics like taste that make the product successful. Is that correct?

A. That's correct. Yes.

Q. All right. Are there any technological innovations on the horizon in the foreseeable future that are going to affect that fact that you can't raise alcohol content without adversely affecting product taste?

A. I don't believe that there are, in the sense that again, it's like asking for a beer that has no calories but has a high alcohol content. There is some basic laws of physics that you cannot change. Again, once you raise alcohol, you're going to have to think of what else you need to do with the sugar and the bitterness to achieve the new balance. So now you have a new balanced product and you say it is well liked? Well, it appears to be well liked. That's great; but now does it conform to the product that we started with? No, it's totally different.

So the answer is no, I don't see anything that will substantially change in technology in the years to come that would enable us to indiscriminately raise the alcohol level without altering its final product characteristics.

MR. OADE: Thank you, Dr. Patino. That's all I have.

THE COURT: Any questions based on this last group of questions?

\* \* \* \* \*

[139] ROBERT RECCHOLTZ [sic], called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please have a seat.

[140] DIRECT EXAMINATION

BY MR. OADE:

Q. Mr. Rechholtz, will you state your current posi-

tion with Coors Brewing Company?

A. I'm executive vice president, marketing, domestic and international.

Q. Is there any higher official in the company with respect to marketing and product sales?

A. No.

Q. Do you sit on the board of directors of Coors Brewing Company?

A. Yes.

Q. What is the difference between Adolph Coors Company and Coors Brewing Company?

A. The Coors Brewing Company is devoted solely to the production and the marketing of malt beverages. The Adolph Coors Company, which is the holding company, is also associated with other endeavors, such as ceramics and biotechnology, packaging, etc.

Q. Is Coors brewing a wholly owned subsidiary of the Adolph Coors Company?

A. Yes.

Q. How long have you been at Coors, Mr. Rechholtz?

A. Approximately 11 years.

Q. And how long have you been in a marketing capacity career- [141] wise?

A. Hate to say. 34 years.

Q. And are all of those 34 years in executive marketing positions?

A. Well, I started out as a grunt with Procter & Gamble and worked my way up.

Q. All right. And what companies have you worked for besides Coors and Procter & Gamble?

A. I worked for R.J. Reynolds Tobacco, for Liggett Group, for Gallo, Joseph Schlitz Brewing Company, and Coors.

MR. OADE: Your Honor, we would tender Mr.



Rechholtz to the Court as an expert in marketing in general and with respect to the brewing industry in particular.

MS. RUSSOTTO: Your Honor, we don't have any objection to Mr. Rechholtz being termed an expert in marketing, as long as that expertise is limited to the United States; and I believe that we're going to get in to some other aspects later on, and we will be asking for an opportunity to voir dire Mr. Rechholtz based on his knowledge of marketing and beer markets beyond the United States. But as to the United States, we have no objection.

THE COURT: I will accept him as an expert witness, then, in the marketing area in the brewing industry in particular. If you're going to get into international, you're going to have to lay further foundation to see if he is or is [142] not an expert.

MR. OADE: I'll do that right now, your Honor.

BY MR. OADE:

Q. Mr. Rechholtz, does Coors sell its products in Canada?

A. Yes.

Q. And how long has Coors sold product in Canada?

A. Approximately five years.

Q. What products does Coors sell in Canada?

A. Coors and Coors Light.

Q. Do you — how do you sell Coors and Coors Light in Canada?

A. We have a licensee, Molson Brewing in Canada; and they are empowered to brew and to market our — those two designated products.

Q. Prior to Coors entering the Canadian market, Mr. Rechholtz, did you examine the Canadian brewing market?

A. Yes, we did.

\* \* \* \* \*

[159]

**REPORTER'S TRANSCRIPT**  
(Trial to Court: Volume II)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 10:00 a.m., on the 27th day of October, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

\* \* \* \* \*

[164]

**DIRECT EXAMINATION (resumed)**

BY MR. OADE:

Q. Mr. Rechholtz, I want to ask you some questions about why Coors has decided to file this lawsuit and the type of relief Coors seeks and why. And let me start just by asking you to give us a little background on why Coors filed this case and what Coors hopes to achieve.

[165] A. Well, there are two basic reasons. The first reason is our research: It is indicated that beer drinkers had a misperception of the body and alcohol content of our Coors Banquet product. This is a very clean, crisp, fresh product; and the perception was that it was lower in alcohol than its major competitors. And we felt that alcohol content labeling would set the record straight and provide a level playing field for consumer choice.

The second reason has to do with the industry. It has been our feeling for some time that the brewing industry is in the forefront of where consumer alcohol beverage choice is going; that people in this country are opting for lower-alcohol, more moderate beverages, and that with alcohol content labeling, we would provide this trend and these consumers with a better basis for judgment on the products they would use within the brewing industry. And we felt that that would give our industry an advantage and also give the consumer the basis for informed choice.

Q. Now, Mr. Rechholtz, you indicated that the Coors Banquet Beer was equivalent to its competitors. Is that correct?

A. Yes. It's basically equivalent to its competitors on most characteristics. The alcohol level, if you select the competitors as being Budweiser and Miller, two major competitors, our alcohol content is within .2 or .3 of those products.

[166] Q. Would you turn to Exhibit 3, please, in the plaintiff's book, which shows the U.S. beer volume share by alcohol content, top 30 brands. I'll just ask you some questions about that. First of all, I'll ask you what it shows.

A. This exhibit arrays on two axes the alcohol content by volume against the share by those brands represented in the alcohol by volume categories. In other words, it gives you an indication of the volumetric importance of those brands falling within certain categories of alcohol content.

Q. It seems to show that if you add up 47 point—you have 4—I'm sorry. You have 47 percent of the products are between 4.5 and 4.9 percent. Is that correct?

A. Correct.

Q. And then 35.38 percent of the products are between 4 and 4.4; is that correct?

A. Yes.

Q. And if you add that up, it's what, about 83 percent?

A. Close to 83.

Q. Does that mean that 83 percent of the major products in this country are in that alcohol range?

A. Yes. 83 percent of the volume.

Q. You indicated that there was this misperception of Coors as not being within the range of these other products. How would alcohol content disclosures change this over time?

A. Well, it would provide the consumer immediately with [167] factual information by virtue of it being on the package, if that were the course that the ATF would take in requiring content labeling. Under that scenario, any consumer who was contemplating purchase or who made purchase would know by looking at one of the panels on the package what the alcohol content is. In fact, he could do comparison shopping, if he wished to, before he made his purchase.

Q. Are you aware as to whether or not malt beverage consumers in the United States—what their level of awareness of alcohol content is?

A. It's very poor. In fact, it's shockingly poor. The majority of U.S. beer drinkers can't even come close to estimating the alcohol content of their product.

Q. Would you turn to Exhibits 9 and 10, please, and ask—I'll ask you what those exhibits mean to you as a marketing professional.

THE COURT: Can I just clarify one thing? Is it also correct that most people don't understand the difference of percentage by weight or percentage by volume? The chart that you just referred to, I noted, was alcohol by volume, which means a higher percentage than it would be if it were alcohol by weight.

THE WITNESS: Yes, your Honor. There is a lot of confusion on that subject. The history would suggest that most people think of it in terms of alcohol by weight; and the [168] reference point is 3.2 beer, which has its roots in the military and the evolution of our own industry and the regulation of that industry even to this day. They seem to differentiate between 3.2 beer and regular or strong beer and very little in between.

THE COURT: But 3.2 beer is by weight. If you were to convert it to volume, do you know off the top of your head what it would be?



THE WITNESS: About 4.0, or light beer.

THE COURT: Just to make sure I understand—I think I do—the difference, there is a difference between weight and volume—is because alcohol weighs less than water.

THE WITNESS: That's my understanding.

THE COURT: All right. Continue with your next question.

BY MR. OADE:

Q. Would you explain Exhibits 9 and 10 and what those mean to you as a marketing professional on this issue that we've just talked about as to what consumers know and don't know about alcohol content?

A. Well, I'm looking at Exhibit 9, which compares the recognition of alcohol content of U.S. beer drinkers with Canadian beer drinkers; and in the U.S., 2—approximately 22 percent, 22.6 percent of the beer drinkers can correctly identify the alcohol content within a range of 2.6 percent, [169] whereas in Canada, 68 percent of the beer drinkers can correctly identify within that very broad range.

\* \* \* \* \*

[173] Q. Mr. Reccholtz, I was asking you about Exhibit 9, and I believe you explained that. Would you now explain Exhibit [174] 10?

A. Yes. Exhibit 10 profiles the U.S. vs. Canada in terms of those respondents who mentioned a particular brand, their brand of beer. And they were asked if they knew the approximate alcohol content of it that beer. In the U.S., only 31 percent of the respondents could come within that range of correctly identifying the alcohol content, whereas in Canada, 72 percent of the consumers of the mentioned brand could identify correctly the alcohol content within that range.

THE COURT: I thought that chart on 10, it just says that it shows the percentage responding yes to the question.

THE WITNESS: Yes, ma'am; but the question was can you identify—I believe I'm correct in this—can you identify what is the approximate percent of alcohol content of the brand of beer you drink most often.

THE COURT: That was 9.

THE WITNESS: That was 9. And then the follow-up on 10, percent responding yes to the question. Among those responding yes, what percent could correctly know the percent of alcohol of that brand, know the approximate percent of that brand that they identified, is the way I understand the chart. If fact, the question reads, "You mentioned that Brand X," whatever that is, "is the brand of beer you drink most often. Do you know the approximate percent of alcohol of this brand?"

BY MR. OADE:

[175] Q. That's just the people that answered yes, they knew?

A. In other words, with the open-ended question, do you know the correct amount of alcohol; and they said, Yes, I do. I drink, let's say, Budweiser, and I know the correct percentage. And only 31 percent actually did of those who thought they did. Only 31 percent in the U.S. actually did, whereas in Canada, 72 percent could verify that they did, is my interpretation, your Honor.

Another way to phrase it, perhaps, which is a common research technique, when people say they correctly identify or remember a slogan, you ask them to prove it; and then you determine what percent could actually prove that that was a correct response. And it's a similar technique that was used here.

And in the U.S., only 31 percent could actually back up their claim that they knew the alcohol content in the U.S.



Q. Mr. Rechholtz, you indicated that beer is the beverage of moderation. Is that correct?

A. We believe that it is, yes.

Q. Would you explain what you mean by that?

A. Yes. People who use beverage alcohol, the overwhelming percent—and I believe it's 98 percent by an Anheuser-Busch study or one that they've been referencing lately—approximately 98 percent of the people who use alcohol beverages know that these beverages have an effect on coordination, an effect on mood amelioration. And our studies indicate that an increasing percent of the users of consumers of beverage alcohol desire to go to a lighter or lower alcohol product in the interest of moderation, in the interest of better dealing with responsible behavior.

And I think that the growth of the light beer category, although it is also calorie-related, and the rapid emergence of the nonalcohol beer category would suggest, would support this trend that we identify in our own research.

Q. Does Coors have any intention, or does Coors believe that if alcohol disclosure laws—if alcohol disclosures are permitted that Coors would market alcohol strength to build its market share?

A. No, we have no plan to do that. Our reason for being in business and anybody's reason in the brewing industry is to meet consumer demand for a particular product. And right now, the consumer demand is for lighter and lower alcohol beer. That's where our greatest growth is. That's where our opportunity is.

Clearly, there is also a much smaller consumer demand for a perceived-to-be-higher-alcohol product, malt liquors. Malt liquors have about 3 percent of the U.S. market. There is a much smaller segment that also wishes to have that product; but our interest and our growth is based on appealing to where the majority of the demand

is, and that is clearly not in [177] higher alcohol but in lower alcohol.

Q. Does Coors have a malt liquor product on the market?

A. No, we do not.

Q. I'd like to turn to Exhibit 1, please, which is the submission that Coors made to the ATF with some attachments. And I'd just like to ask you if these are samples of what Coors might do in the case subject to any limitations that may be placed on it.

A. Yes. These are examples of packaging and television advertising which indicate how we would suggest treating alcohol content if the—if a law were changed and if the BATF sought or committed to promulgate regulation on how it should be used. And in fact, we discussed this with the ATF, and these were just samples of how it might be done.

Q. Would you look at page 5 of 5—5 of Exhibit 1, where it's an ad that says, "Count on Coors for the facts." Do you see that?

A. Yes.

Q. Was that submitted to the ATF for approval?

A. Yes.

Q. Would Coors use something like this, or would Coors—would that depend on what the ATF regulations were?

A. Well, it would depend on ATF. But this was simply an example of how we might present the factual information on alcohol content without making any further claims.

[178] Q. Let's suppose the ATF were to say to Coors or to regulate, Well, you can show it on the label, you can make a simple statement in ads, but you can't do anything else. Would Coors have any objections top [sic]?

A. No, that would be perfectly acceptable. That would accomplish our dual objectives as a company and an industry.

Q. Now, you said you had discussion with—

THE COURT: Let me make sure I'm understanding. You can show it on the label and you can do what?

MR. OADE: Put a little line, a disclosure on the ad, your Honor. If you look at the Mark Harmon ad, you'll see that it's just a standard Mark Harmon ad. It's on Exhibit 1, page 4 of 5; and if you look down in the lower right-hand corner, the only difference between that Mark Harmon ad and the one we submitted to the ATF is a statement that says, "Contains 4.6 percent alcohol by volume."

THE COURT: I would be interested in what Mr. Rechholtz' answer would be if it was asked whether if they could put it on the label period and not use the content in advertising at all.

MR. OADE: He can answer that question.

THE WITNESS: That would be perfectly acceptable, your Honor. That would provide the consumer with factual information on which to make an informed choice. Clearly, advertising would provide you another opportunity to get that [179] information out; but we believe that the package, being the primary unit of purchase, would be quite satisfactory.

BY MR. OADE:

Q. Now, you indicated, Mr. Rechholtz, that you had some conversations with ATF about their position on whether consumers should have this information subject to ATF regulation. Is that correct?

A. Yes.

Q. And would you tell us about that, please.

A. Yes. We frequently meet with the ATF to discuss issues. They encourage that, in addition to sometimes if it

is an area that we're concerned about, seeking even pre-approval or pre-opinion of a particular marketing program or ad. And in the course of one of these discussions—I don't remember the exact date—we brought up the subject of alcohol content labeling, the fact that we felt it would be very appropriate, particularly in this day and age, when consumers are quite sophisticated and enlightened, that it's time they know this; that they know it for wine and spirits, and it seems totally illogical, in fact, almost a contradiction, not to have it available on malt beverages.

And they said they agreed, but the way that that would have to be achieved is, in fact, they suggested that we prepare advertising packaging, submit it to ATF. They would be forced to reject it under the FAA Act, and then we would pursue due [180] process on the subject.

Q. Now, you have heard some testimony about some point-of-sale materials that were used by Coors. You were here when Mr. Cates testified. Is that correct?

A. Yes.

Q. I would like to ask you some questions about the issues raised by Mr. Cates and particularly by Government's Exhibits AL and AI, if you could turn to those exhibits, please.

A. Okay.

Q. Do you have in front of you Exhibit AH, please; and I'm going to refer you specifically to the wallet cards—

A. Yes, I do.

Q. —that we talked about.

Now, what was the—what were these wallet cards and why—how did they come to be?

A. My recollection is that these wallet cards were prepared by a distributor; and again, I think it was only one distributor, but I'm not denying it might have been



more. My recollection is one distributor, who had them prepared in order to answer consumer questions that his salemen were encountering on and off accounts from consumers who either wanted to know the alcohol content of their beer or who challenged the fact that in their mind that Coors had less alcohol than competing products. And this distributor had them prepared to provide this factual information, much in the same way that we have an 800 line, where consumers call in wanting to know these facts and we respond, much in the same way that for many years we have annually produced with approval a fact brochure on our products which describes our various products, how they're made and what the alcohol content is.

Q. Is it your understanding, Mr. Rechholtz, that it's permissible to give consumers this information over the phone, or whatever, as long as you don't put it in the most appropriate place, which is the label?

A. That's my understanding. We are permitted to provide factual information in response to questions.

Q. Now, there was also an issue Mr. Cates raised about some apparent violations by Coors with respect to the use of the word "strong." Do you recall that?

A. Yes, I do.

Q. Would you explain that to the Court, please.

A. Yes. Again, dealing with the consumer misperception of our products, in the State of Iowa, they have a statute that requires product over certain alcohol level to be labeled "Strong"; and we approached the state authorities on that subject and asked permission to use a "strong" legend on our primary packaging in a certain fashion. They approved it, we did it, and the BATF did not think kindly of that, and that was part of this matter that was discussed yesterday.

Q. Was the reason ATF didn't think kindly is that you didn't [182] submit the label to them in the first place?

A. That's correct. Well [sic] dealt with the state authorities who do have the—under the 21st Amendment, who do do have the right to deal with those issues.

Q. Now, how did it come about that these two incidents—and I'd like to direct your attention to Exhibit A-1 with this supposed fine in the amount of \$150,000. Did that find cover in your judgment any violations of the current FAA Act on alcohol labeling?

A. No. We did not admit guilt in any of these matters, most especially not with regard to the wallet card.

Q. And how about the use of the word "strong" in Iowa?

A. No, we felt we were justified in doing that with state approval.

Q. And did any of these other matters that are addressed in this exhibit deal with alcohol content labeling?

A. No.

\* \* \* \* \*

[183] Q. Now, I'd like to direct your attention to the period of time during which the Government was enjoined by this court from enforcing its regulations insofar as they prohibited disclosures of factual information. Were you here in the first court hearing, Mr. Rechholtz, back in '89?

A. Yes, I was.

Q. And was it your understanding that as a result of that court hearing, Coors could disclose factual information?

[184] A. That's my understanding.

Q. And did Coors during the approximate or a little more than two-year period of time between this court's ruling and the Tenth Circuit's decision—did Coors do any type of advertising of alcohol content to consumers?

A. We did not.

\* \* \* \* \*



[187] Q. Let me turn to the product called Coors Extra Gold, Mr. Rechholtz; and I want to ask you some questions about Coors Extra Gold, about what type of product it is, why it was developed, and then I'll ask you about some of the things the Government says Coors intends to do with this product.

First of all, what is Coor Extra Gold?

A. Coors Extra Gold is a full-bodied premium beer with an alcohol content of approximately 4.9 percent by volume.

[188] Q. And when you say a "full-bodied beer," what is "body" when you refer to the body of a beer?

A. 'Well, generally, the consumer defines that in terms of a taste characteristic; and a full-bodied beer would be richer-tasting, it would have more mouth feel, it would have more inten[se] taste notes, malt, hops, etc. And the reason that we created this product was to fill the perceived void left by Coors for that—for those characteristics.

Q. Okay. Now, have you read the Government's trial brief in this case, Mr. Rechholtz?

A. Yes, I have.

Q. I'd like to ask you about their statement that the Government made with respect to Coors Extra Gold. I'll quote from page 30 and ask you to comment. Quote: "Coors both designed Coors Extra Gold to be higher in alcohol content than its competition and planned to market the beer based upon the higher alcohol content. Coors Extra Gold was introduced because the Coors brand was losing market share to its competitors, and Coors did not believe that the brand could be brought back to its previously successful position in the marketplace."

And they cite your deposition as authority for that statement. Is that a fair characterization of why Coors Extra Gold was introduced by Coors?

A. No, it is not. The first part of that statement is [189] inaccurate. The second part of the statement, which relates to our need for a new brand to hopefully pick up some of the lost Coors volume, is accurate. The first part is inaccurate.

Q. Now, on page 31, with respect to the introduction of the Coors Extra Gold product, the Government says in their brief, and I'll quote, "The timing is significant, because it was during that time period that Coors decided to pursue attempts to place statements of alcohol content in the labeling and advertising of its products. The timing strongly suggests that Coors created a higher alcohol product in anticipation of being able to sell that product based upon its alcohol strength relative to the rest of the market. The advertising campaign developed to sell Coors Extra Gold bears out this hypothesis."

Is that an accurate statement?

A. No, it is not.

Q. What about the timing of the introduction of Coors Extra Gold? Does that have anything to do with this case?

A. No, it had nothing to do with this case. In fact, you would have to go back in history. Prior to Coors Extra Gold, there was another brand we introduced in test called Coors Golden Lager; and this was our first attempt to address the need to have a new second premium brand to replace that volume lost by Coors. Golden Lager was not successful in test market. We—That project was succeeded by the Extra Gold project; and the design specs for that project were to provide a more [190] full-bodied, richer-tasting beer that would fill our need as a company for a brand at the higher end of that spectrum, the lower end being Coors Light, the middle being Coors, and the higher flavor intensity being the Extra Gold project.

Q. How long—

A. I should also add—and I think you heard expert testimony from Dr. Patino yesterday—that in the process of getting a fuller, richer product, you use more material and you have more fermentable material. And in most cases, you're going to get a slightly higher alcohol level, which is exactly what happened.

Q. Well, was Coors Extra Gold designed to have higher alcohol level?

A. Not specifically designed to have it. The primary design was a fuller-tasting, richer product.

Q. On page 29 of the Government's brief, the Government says, and I'll quote, "In essence, Coors believes that it cannot sell its beer effectively unless it can sell that beer based at least in part on alcohol content."

The Government then concludes that, quote, "Coors's attempt to sell Coors beer based on alcohol content could not be more apparent."

Is that a true statement?

A. No, that's not accurate. In fact, if you look at the facts, our greatest growth, our primary growth in the last 10 years, has come from light beer and nonalcohol beer, which either have [191] no alcohol or lower alcohol.

Q. I want to now turn to the product range of beers just in a general sense. What broad categories of types of beer or malt beverages are there?

A. Well, it depends on how you categorize those choices. You can look at it in terms of price points, which are not necessarily indicative, or you can look at it in terms of what we call regular beer and premium beer and super premium beer. Those are descriptors that generally relate to price points; or you can look at categorization by calories, light beer as opposed to regular beer, or you can look at it in terms of where the consumer, the beer drinker, places the product in terms of image on his perception scale.

Q. Do consumers differentiate between products based on price and, say, calories?

A. Yes, they do.

Q. Tell me on this scale here of beers, first of all, you have light beers. Is that corrects?

A. Yes.

Q. And then you have what other categories of beer?

A. Well, you have the light beer category, which is approaching a third of the market. Then you would have your so-called "premium" category, which is still the dominant market share; and that would include brands like Coors and Budweiser and Miller High Life.

[192] Then you would have the up-chart categories, which begins with brands like our own Killian, which we would call a super premium. Michelob would be a super premium.

Q. How about Lowenbrau?

A. That would be a super premium. Then you would have your imports, H[eine]ken, Beck's, etc., which would be at the high end of the category in terms of pricing and are also subcategorized as imports.

Then at the low end you have subpremiums. They're priced just under premium.

Then you would have what we term popular. That's the next lower price point.

And then you would have economy brands, and that would be the lowest price point.

Q. Where is the volume and the money to be made among those products?

A. In premium brands, regular premiums, and premium lights. That's where the vast volume is, that's where the margins are.

Q. We've heard testimony about the malt liquor segment of the market being 3 percent. Do you recall that testimony?



A. Yes.

Q. Do malt liquor drinkers share the taste preferences of the other 97 percent of malt liquor (sic) drinkers?

A. They do not.

Q. I would now like to turn to another topic area, Mr. [193] Rechholtz, which is drawing on your expertise as a marketing professional in this industry to give the Court an opinion of what we can expect if alcohol content disclosures are permitted in this country.

First of all, I'll ask you if alcohol content disclosures were permitted in the manner suggested in Exhibit 1, of Coors Exhibit 1, either on the label or in ads, do you have an opinion as to whether this will result in brewers' raising the alcohol content of their products or attempting to market alcohol strength?

A. Of course, this is speculative in the absence of it actually happening or being tested; but no, I don't think it would — it would result in brewers' making any significant changes in content up or down, for some of the reasons that Dr. Patino referenced yesterday. Also, you're talking about established brands like Coors Light and Budweiser and Miller, and so on; and when you begin tampering with alcohol levels of these brands, you change the taste characteristics and you run the risk of chasing away some consumers. And that's a considerable risk.

Q. Well, when you say it's speculative, Mr. Rechholtz, would Coors — do you have to speculate to give an opinion on what Coors would do if alcohol content labeling was allowed? Would Coors raise the alcohol content of its light beer or its Coors Banquet?

[194] A. No. I see no reason to do that. Our brands are competitive now. We'd simply be delighted that the consumer has this information and can make a choice.

Q. Now, what type of purchase patterns or trends would you expect would result, if any, from alcohol content disclosure laws?

A. Well, again, it is speculative. I think a number of things would happen. First of all, there are a percent of consumers who do not currently know that certain categories of beer have more or less alcohol. The users of malt liquor brands know that they have higher alcohol even in the absence of alcohol content labeling because of the way these products have been marketed over the years. They've been marketed as more macho, higher-strength products.

On the other hand, the light category, which is the highest category in the country and the fastest-growing category of major brands, is perceived as a consumer choice by virtue of fewer calories. A certain percent of those consumers also know that the light category also has less alcohol, but there is a fairly large percent that do not; and I think it may even accelerate the growth of the light category.

There is some precedence for this. In Canada, for example, in British Columbia, where light beers, I believe, have the highest penetration in Canada, consumers are very much aware, as they are all in all the provinces. In addition to [195] that, that province provides an incentive to purchase light beers, and they're way over-developed; so I could conceive of some changes in category development but basically favoring the more moderate categories as opposed to the higher alcohol categories.

There may be one other change, and that is within that malt liquor category, which is about 3 percent of the market, it is possible that there may be some brand shifting. Whereas now, they only guess what the alcohol level is, they would know and they might make some brand choices within that current category.



Q. Now, you were here yesterday when Dr. Patino testified about the taste test of a product being raised from 3.5 percent alcohol to 3.7 percent and how that polarized consumers on a blind taste test. Do you recall that testimony?

A. Yes, I did.

Q. According to Mr. — or Dr. Patino, one-third of the consumers didn't like it, one-third did like it better and one third didn't care. Do you recall that?

A. Yes. I do.

Q. Dr. Patino was asked about the marketing significance of that, and because he's not a marketing expert did not address that question.

What is the marketing significance of that type of polarization in a taste test resulting from just that small [196] increase in alcohol content?

A. That's a very dangerous scenario. Whenever you have as many people disliking something as like it, you general abandon it immediately.

What you look for are ratios which may be 3 or 4 to 1 likes vs. Dislikes. You also don't like a high neutrality base, because that means you haven't really excited a lot of people about anything. So what you'd really like to see is maybe 60 percent like it, 20 percent or less don't like it, some leaning toward it, but a small neutrality area. You're looking for the highest like to dislike ratio as possible.

Q. I'd now like to turn to what's happening and what the experiences have been in the Canadian marketplace. The first thing I'd like to ask you is in your judgment, is the Canadian marketplace a relevant comparison with respect to the issue before the Court? In other words, do we have anything to learn by looking at what happened in Canada through alcohol disclosure being required there?

A. Yes, I believe we have a lot to learn.

Q. And why do you believe the Canadian marketplace is relevant to these proceedings.

A. Well, there are several reasons. First of all is the proximity of Canada to the U.S. and to our media in the U.S. The vast majority of people — I think it's close to 85 percent — live within 100 to 150 miles of the border, so they have a lot [197] of influence from the United States, No. 1.

No. 2, in recent years, the Canadian market by virtue of consumer demand as well as brewer satisfaction of that demand has more closely paralleled some of the major trends in the U.S. Market. For example, light beer, which is still relatively new to Canada, quickly became a growth category until it achieved — at this point, it has about 15 percent of the market. And in fact, our Coors Light brand is the No. 1 light brand in Canada, which is an amazing feat when you consider starting from scratch, an American brand in a category that previously was not generally favored by Canadians.

\* \* \* \* \*

[198] Q. How would you compare Canada and the United States in terms of similarities and difference in the marketplace?

A. It's very similar. There are, of course, some exceptions. The major exception would be the province of Quebec. And even there, there are probably more similarities than exceptions. The similarities are, first of all, the way we profile consumers in both markets is quite similar. We break them into [199] demographic groups, ranking from blue collar, lower income, to high income, higher educated. We look at the preference patterns among those groups. And the similarities between the two countries are very close.

For example, our own Coors light brand, which we're familiar with in both countries, profiles very similarly in

Canada and the U.S.: younger, better educated, more affluent, higher female, more enlightened, more trendy. That would be one example.

Other examples would be the recent trends, relatively recent, last 10 years in Canada, going from stronger beers to lighter beers. Same thing happened in the United States but about 10 years previous to that.

Sports: I mean the most recent example, it's hard to determine the difference between Toronto and Atlanta in the World Series. When Toronto went back to Canada, they had the same celebration. Even the President of the United States called the locker room.

It's amazing. These countries are so similar—in fact, it's exciting because the whole North American trade thing—I know it's a little irrelevant to this case—is exciting, because here are similarities with these two countries combining to form the greatest trade block in the world, and there are reasons for that.

Q. How about the western provinces, like British Columbia? [200] How do those provinces compare like Washington or Oregon or our western states?

A. Well, that would probably be the closest comparison; and I think that's a function of proximity of the major—the major population center in British Columbia with our Northwest. Also, there has been freer trade of beer between the United States and British Columbia over the years. I don't recall all of the reasons, but I think one of them—When there was a strike in Canada, it seemed to me that British Columbia was one of the first provinces that opened its arms to American products. And also, the cross-travel of the border and the purchase patterns cross-border have contributed to that. So I would say that's probably the best example.

Q. Okay. Now, is beer marketed in Canada fundamentally in the same way that it's marketed in this country

based on taste and image and the things you've identified, or are there differences?

A. Yes, it's very, very similar. There are a couple of differences, and those differences are basically dictated by Canadian statute.

Q. I had previously showed you or directed your attention to Exhibit—Coors Exhibit 3, which shows the bulk of American malt beverages sold between 1 and—I'm sorry—between 4 and 5 percent alcohol. Do you recall that exhibit?

A. Yeah. I can't find it, but I recall it.

[201] Q. Now, how does this exhibit showing the majority of the products in the U.S. sold between a range of alcohol content of 4 and 5—how does that compare to the range of alcohol content in the Canadian marketplace?

A. All right. Let me get this exhibit to be sure. But okay, the—way it shows is the skew of volume as arrayed against alcohol content; and it's a very similar pattern in Canada as compared to the U.S. While the total percentages are a little different—for example, in Canada, I think the bulk of the array is between 4.1 and 5.5. In the United States, it's between 4.0 and 5.0. But essentially, the same pattern.

Q. Now, according to Exhibit 3, the top 30 brands in the U.S., the malt liquor category has 2.69 of the top 30 brands. Is that correct?

A. Yes. In the top 30 brands. And if you were to take in all the brands, I think it would be approximately 3 percent.

Q. How does the malt liquor share in the U.S. Compare to the malt liquor share in Canada?

A. In Canada, it's about 1.8 percent. So it's less in Canada, significantly less.

Q. Mr. Rechholtz, do you see or are you aware of any evidence in Canada of products, malt beverages, being marketed in Canada based on alcohol strength?



A. I am not aware of any, certainly not with any significant brand.

[202] Q. Do you think that if that were going on in Canada, it would have come to your attention?

A. Yes. Our partner in Canada, Molson, would certainly bring it to our attention, both as information and possible action-ability.

Q. At one point in your marketing career, you worked, I believe, in the wines and spirits industry; is that correct?

A. That is correct.

Q. And what was your experience in wines and spirits?

A. Well, when I was with Ligget Group, which is a conglomerate, between 1974 and '77, almost four years—and I started out with Ligget Group in diversification, mergers and acquisitions, and corporate development; and in that role, I had to evaluate all of our company's divisions, which included wines and spirits. At the time, we were involved with Austin-Nichols. Principal brand was a bourbon. We were involved with IVD, which was J & B Scotch. We were involved with Caroline Importers, which had some imported wines. So I had fairly extensive experience during that period of time with Ligget.

Q. During your career in wines and spirits industry, did you see any evidence that distillers or wineries were marketing their product based on alcohol strength?

A. No. As a matter of fact, there was a great sensitivity to that in the spirits industry and I would say the wine industry as well. In the spirits industry, the sensitivity was historic. [203] And the industry went to great lengths to be sure not to market on strength. There are always fringe exceptions, someone trying to be opportunistic, but nothing that I can recall of significance.

In the wine industry, the basic scenario was to sell wine as a product of moderation that was best used with meals and food in a family or a social setting.

Q. Now, are you familiar with how alcohol content disclosures are made in the wine and distilled spirits industry?

A. Yes, I am.

Q. And how are those made?

A. They're made—in the spirits industry, they now do it by proof as well as alcohol content by volume; and in the wine industry, depending on the category of wine, it is by volume. I believe there is a—there are some breaks in that regulation in wine on the low end and the high end; but basically, the vast majority, and certainly table wine, is by volume, and it comes under regulation.

Q. Now, you indicated previously in your testimony that the trend in the marketplace was towards the light beers. Is that correct?

A. Yes, that is correct.

Q. Does that also include the low alcohol or nonalcohol beers?

A. Well, I would exclude the so-called "low alcohol" beers. And the best example of that was a product that we discussed [204] yesterday in someone's testimony; and that was the Anheuser-Busch LA product. That was a so-called "low alcohol" product; and that's in between nonalcohols, which are .5 or less, and light beers, which generally are 4.0. I think that product was 2.2, if I'm not mistaken. I'm recalling several years back.

And that product failed, and the reason it failed, in my opinion, was it wasn't a good product, No. 1; and No. 2, it didn't fill a legitimate need. It was neither a nonalcohol or a light beer. It was in that no man's land; and at that time, the consumer rejected it.



Today, the nonalcohol beers or the .5 or less — and most of those are usually about .2 or .3 — are doing very well, because they fill a legitimate need for a person who chooses to have, let's say, the taste of beer and all of the surrounding camaraderie and sociability but doesn't want alcohol. And that category is growing dramatically. And we have a successful entry in that called "Cutter."

On the other end, the light beers are also growing dramatically; and they have less alcohol as well.

Q. How is Coors Cutter doing in the marketplace?

A. It continues to grow. It's the No. 3 brand. We were the last one of the big three in the category, and so we're coming from behind; but we're showing gradual growth and distribution and volume. We're quite pleased with it.

[205] Q. If Coors were to prevail in this lawsuit, Mr. Rechholtz, would Coors just go out and start putting alcohol content on its labels or using it in ads? What would be Coors' intention?

A. We would not. Our intention would be to wait for the BATF to promulgate the appropriate regulation on how that would be handled.

MR. OADE: That's all I have, your Honor.

THE COURT: Let me just ask one question about the so-called "nonalcohol." Some of the not only alcohols have .5 percent by volume alcohol.

THE WITNESS: The regulation, your Honor, I believe states that they must have .5 or less; and my recollection is that most of them are about .2 or .3, except for those that like Moosey, which we market in this country, which has no alcohol. And that's a reverse osmosis product. They do have trace amounts of alcohol, and that does —

THE COURT: That's what I was wondering. If people are, let's say, allergic to alcohol or have a very bad reaction to alcohol, or we have people who are recovering

alcoholics and who don't drink and they buy something that is indicated to be a nonalcoholic product, it nevertheless may have alcohol in it. Is that what you're testifying to?

THE WITNESS: Yes, I am; and I think that's an important issue. In fact, I can recall fairly recently there was a case where a recovering alcoholic did purchase one of [206] these products and to his dismay found out it did have small amounts of alcohol in it, did not know that.

MR. OADE: Your Honor, I believe that situation was corrected by the ATF in issuing low alcohol regs and to address that problem, kind of stretching the current law a little bit, in my opinion; but they said if you're going to put "nonalcoholic" on your beer, then you have to define it as .05 or less. And that's been a recent development.

THE COURT: Thank you. Cross-examination, please.

\* \* \* \* \*

[211] Q. Now, I believe that on direct examination, you stated that one of the reasons why Coors wanted to place statements of alcohol content on its product labels was to correct a consumer misperception about the amount of alcohol in the Coors Banquet product; is that correct?

A. Yes.

Q. And isn't it true that Coors believed itself to be at a competitive disadvantage because of this consumer perception that Coors Banquet contained less alcohol than Budweiser and Miller?

A. Yes. In some quarters that would be a disadvantage; in others, it might be an advantage.

Q. I see, but in some quarters, it was a competitive disadvantage; correct?

A. Yes.

Q. And in fact, I believe you stated on direct examination that the Coors Extra Gold product was introduced in part to help you with that percentage of the market that was perceiving it as a disadvantage that Coors had less alcohol?

A. Yes, that's correct; but you must also understand that the perception is a guess at all the of several factors: taste, [212] flavor, body, mouth feel, alcohol.

Q. Including alcohol?

A. Yes.

Q. And that's because the consumer — this competitive disadvantage was caused because the consumer believes they're getting less of something, including less alcohol, if they were to buy the Coors Banquet product as opposed to the Budweiser or Miller; correct?

A. Correct.

Q. So you expect to be able to communicate alcohol content to consumers by placing a numerical statement of alcohol content on the product labels; correct?

A. We believe that would fill the bill.

Q. And in so doing, you expect to be able to alleviate this competitive disadvantage among those consumers to whom alcohol content is important?

A. It would help.

Q. Now, and that's because you expect that once consumers recognize that Coors contains as much alcohol as Budweiser and Miller, they might — some of them might buy Coors instead of buying Budweiser or Miller?

A. It would give us a level playing field on that characteristic.

\* \* \* \* \*

[221] Q. Now, you had stated in your direct that volume that was lost by Coors was because of this con-

sumer perception that the Coors Banquet product had less alcohol. Correct?

MR. OADE: Objection, your Honor. I don't believe he said there was volume lost.

MS. RUSSOTTO: I believe that is what he said. Well, I'll ask him the question.

BY MS. RUSSOTTO:

Q. If I've mischaracterized your statement — I believe you did say that there was volume lost by Coors because of the perception. Is that correct?

A. I believe I said that was one of the reasons.

Q. And Coors Extra Gold was introduced to recapture that lost volume because of the consumer perception that Coors Banquet had less alcohol; correct?

A. Coors Extra Gold was introduced to give us an entry in the higher end of the full flavor market.

Q. And part of that was because of the volume that Coors beer had lost because of this consumer perception that it had less alcohol; right?

A. Well, no. No, you're combining several different things [222] and making your own conclusion.

The reality is that the Coors brand had been on a long-term volume decline for a number of reasons. One of those reasons was a consumer perception that it was a weaker, lower-alcohol product. One of the reasons.

The introduction of Coors Light helped to recapture a lot of that Coors volume for the company.

Q. Of Coors Light?

A. Yes.

Q. So let me see if I understand this correctly.

A. I want to finish the answer.

Q. Please. Go ahead.

A. Because I'm pursuing a train of thought.

Q. Go ahead.

A. Coors Light being a new product helped us to recapture volume that we had lost on the Coors brand. The introduction of Coors Extra Gold at the higher end of the category also enabled us to recapture some volume that was lost by the Coors brand. We also got new users who had never used Coors or Coors Light. It's not—it's a more complicated, multidimensional consideration than simply a direct correlation to the perception of alcohol, is my point.

\* \* \* \* \*

[228] [Q.] What are the brands that Coors sells in Canada?

A. Coors and Coors Light.

Q. Okay. And what is the alcohol strength of the Coors beer in Canada?

A. Coors is 5.0 by volume, plus or minus .2.

Coors Light is 4.0, plus or minus .2.

Q. What is the alcohol strength of Coors Banquet in the United States by volume, since you've given it to me by volume in Canada?

A. I'd have to correct it. I know it by weight. It's 3.56 by weight. By volume, that would be, I believe, 4.4; 4.5. Dr. Patino has got his calculator.

THE COURT: You're asking him about which beer now?

MS. RUSSOTTO: I'm asking about the Coors beer, Coors Banquet beer: what the alcohol content is in Canada and what the alcohol content is in the United States.

THE COURT: Okay.

THE WITNESS: If someone would divide 3.56 by 88, I could provide you with an answer.

BY MS. RUSSOTTO:

Q. Math is not my strong point, but I'll say—

A. Well, I'll be glad to get my calculator.

MS. RUSSOTTO: Hold on just a moment the Preston, do you have that? I'll take whatever you've got.

[229] MR. OADE: Looks like 4.5 percent.

MS. RUSSOTTO: I thought he said 4.4 percent.

MR. OADE: 4.5 percent.

MR. RUSSOTTO: 4.5 percent. Okay.

BY MS. RUSSOTTO:

Q. So the alcohol content of Coors that's sold in Canada is higher than the alcohol content of the Coors that's sold in the United States; correct?

A. Yes.

Q. What is the average alcohol content of the light beers in Canada?

A. Approximately 4.0.

Q. And what is the average alcohol content of the premium beers in Canada?

A. 5.0.

\* \* \* \* \*

[231] Q. Let me ask you: You I believe said earlier that the light beers in the United States enjoyed a 33 percent share of the market, approximately?

A. Approximately 33 and growing.

Q. And what is that share in Canada, if you know?

A. It's approximately 15.

Q. 15 percent?

A. Yes.

Q. And how much of the market in Canada is attributable to nonalcoholic beers?

A. Very little. It's a small fraction.

\* \* \* \* \*

[233] Q. Are you aware—I want to leave aside the light beers for now, the 15 percent of the market that's attributed to light beers in Canada. And you've given me pretty



much what the market share is for the other categories. Are you aware what the market share for those other categories was before Canada changed its content label laws in 1976, what the product mix there was?

A. In 1976? No, I am not.

Q. Are you aware of what the product mix was 10 years ago of these categories of beer that are not light beer?

A. Yes. Light wasn't a factor, and that volume was in premium and ales and stouts.

\* \* \* \* \*

[234] Q. Okay. What is the market share of Coors Banquet right now in Canada?

A. Oh, we have a relatively small share. We're down to about—I believe it's a 1.8.

Q. You said you're down to a 1.8. Was it higher before?

A. Yes.

\* \* \* \* \*

[289] MS. RUSSOTTO: That's true, your Honor; but again, what we're concerned with here are the labeling restrictions [290] for malt beverages, not for wines or distilled spirits. And the fact is that malt beverages are the products that are consumed in more informal societal situations. You go to the ballpark and have a [beer]. You don't go to the ballpark generally and have a glass of Chablis.

I think that there has been testimony to that effect today, and I think it's particularly relevant that if alcohol content information is going to be provided that it be provided in an useful manner. Coors doesn't intend to do that.

I also wanted to note that there was some confusion about whether or not calories, statements of calories, were

permitted on premium beers. In fact, ATF ruling 79-17 permits brewers to state the caloric content, but they have to state it in the same way that would have to be stated on a light beer. In other words, they have to provide, I think, a statement of carbohydrates and a statement of other sort of product information with it. In other words, they have to provide the information in a way that's going to be useful to the consumer.

Now, there are other avenues for disclosing alcohol content, your Honor. Plaintiff characterizes the statute as totally prohibiting and totally suppressing the disclosure of alcohol content, and that's simply not true. Brewers are not prohibited from revealing alcohol content information to consumers who call or write and want the information. They're not prohibited from providing the information to consumer [291] groups or to the newspaper or to the television or radio media, and that could be disseminated.

THE COURT: What exhibit says that?

MS. RUSSOTTO: Well, I believe that Terry Cates testified to that, your Honor, yesterday afternoon; and I believe that Mr. Rechholtz this morning testified that he was aware that those avenues were available for the disclosure of alcohol content information.

THE COURT: I thought he said just the opposite. I thought he said he didn't know.

MR. RUSSOTTO: Well Mr. Cates is any event did testify that alcohol content can be reached through these different mechanisms, your Honor.

THE COURT: Go ahead.

MS. RUSSOTTO: And in fact, Mr. Cates also said that ATF is preparing for publication of the results of an ongoing study of alcohol content; and Mr. Cates said that ATF is going to publish this as a resource.

Mr. Rechholtz this morning also testified that Coors has its own 800 number. There are no regulations or statutory

provisions that prevent Coors from putting the 800 number on its product labels and saying, For information regarding this product, call 800 . . .

In addition, states can require that alcohol content be disclosed in malt beverage labeling and advertising. The [292] statute says that if you can't—the statute only prohibits statements of alcohol content to the extent that they are—unless the state provides otherwise, is the way it's stated. State law can allow brewers to put statements of alcohol content on their products.

THE COURT: Did you read in one of those depositions that Minnesota does have some laws to that effect?

MS. RUSSOTTO: I believe Minnesota is one of the states that has laws to that effect, your Honor. There are a number of others, also. Generally, what they provide is for a ceiling or a floor. In other words, if you're going to call yourself a malt liquor, you have to have at least 4.5 percent alcohol by weight, I think it is. If you're—if you have—you can put a statement of alcohol content on the product as long as the product has no more than 3.2 percent beer. You can't put it on if it has more.

Those are the types of state statutes that are on the books. I don't know of any that just flat out say, You can put alcohol content on there if you want to.

The point, your Honor, is that the statute only prohibits the brewers from communicating alcohol content information to consumers in a way that's likely to induce the consumers to consider alcohol content as a product attribute, and that's in the labeling and advertising of the product. It does not prevent them from disclosing alcohol content entirely [293] and by using other avenues to do so.

THE COURT: Let me just correct you on one thing. The statute does say, "unless required by state law." So the state law could not say, "Put it on if you want to." It must say, "You must put it on."

MS. RUSSOTTO: That's correct, your Honor. But state law can require it. That's right.

Now, I'd like to discuss the limited nature of the relief that the plaintiffs have said they seek here; and I believe that your Honor has indicated that you have some questions about that.

Coors has made much of the fact that it seeks only to place numerical statements of alcohol content on its products, and Coors claims it wants to leave intact ATF's ability to regulate these descriptive statements of content.

Coors has identified the two regulations it wants stricken, but what they fail to recognize is that these regulations are only implementing existing statutory provisions. They don't exist in a vacuum, and it's the statute that prohibits, quote, "statements of, or statements likely to be considered as statements of, alcohol content," end quote.

THE COURT: I'm sure Mr. Oade is very familiar with the statute. We talked about that in the last case and in this one. But in any case, go ahead.

MS. RUSSOTTO: All right. Plaintiff's proposed change to the statute involves just striking out the first three words, quote, "statements of, or," end quote.

But that still makes illegal statements likely to be considered as statements of alcohol content, and that would include both descriptive and numerical statements of the alcohol content.

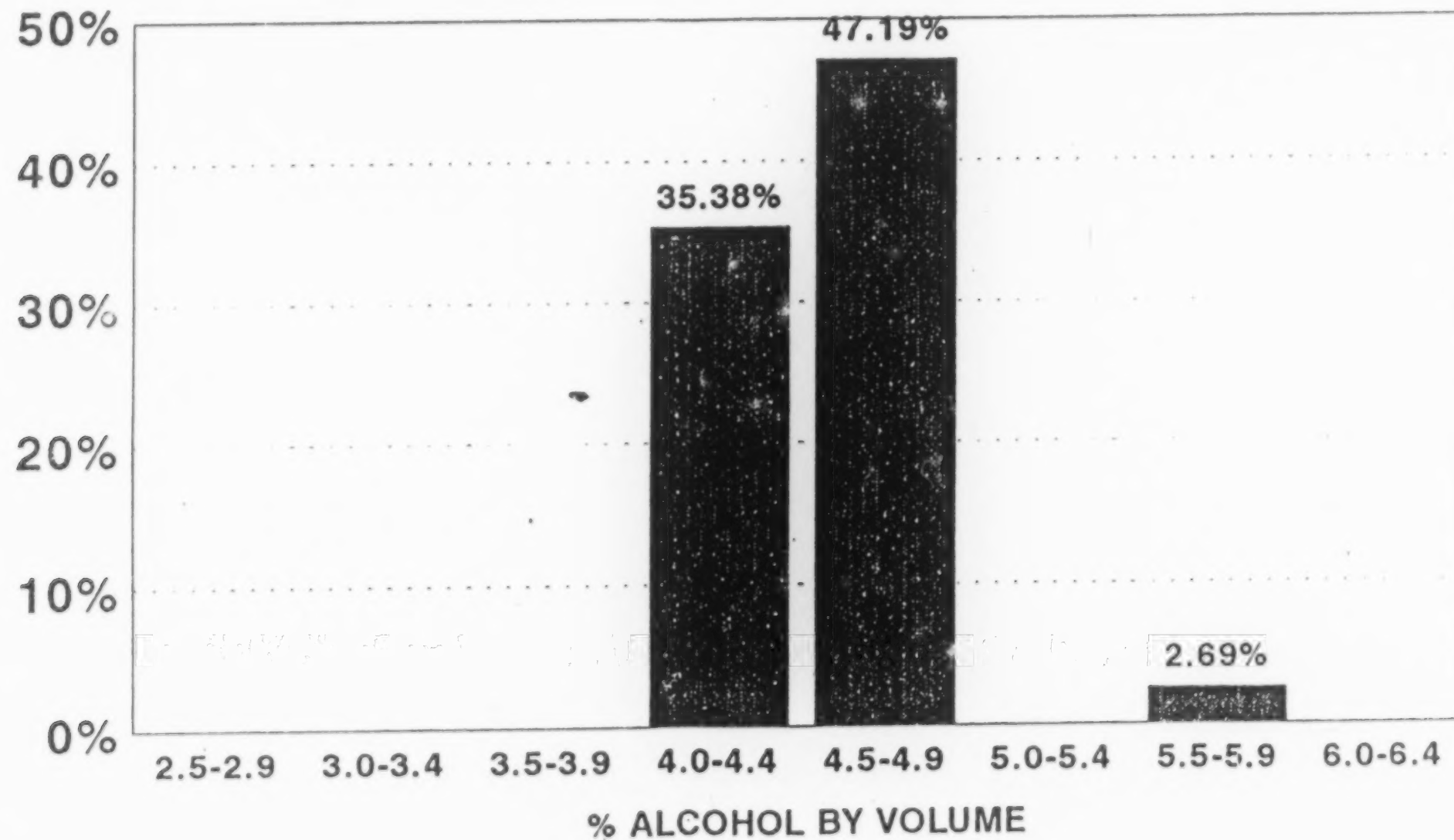
## [Plaintiff's Exhibit 3A]

*ALCOHOL % BY WEIGHT*

PowerMaster	5.90
Olde English 800	5.64
Schlitz Malt Liquor	4.67
Colt 45	4.60
Heineken	3.91
Coors Dry	3.90
Keystone Dry	3.90
Coors Extra Gold	3.89
Killians	3.88
Michelob Dry	3.78
Bud Dry	3.76
Keystone	3.75
Old Milwaukee	3.73
Budweiser	3.71
Busch	3.70
Michelob	3.70
Strohs	3.69
Miller Genuine Draft	3.66
Miller High Life	3.61
Coors Repeal	3.54
Old Milwaukee Light	3.44
Milwaukee's Best	3.37
Strohs Light	3.35
Miller Lite	3.30
Coors Light Repeal	3.29
Michelob Light	3.28
Bud Light	3.28
Busch Light	3.28
Keystone Light	3.10
O'Douls	0.35
Sharp's	0.30



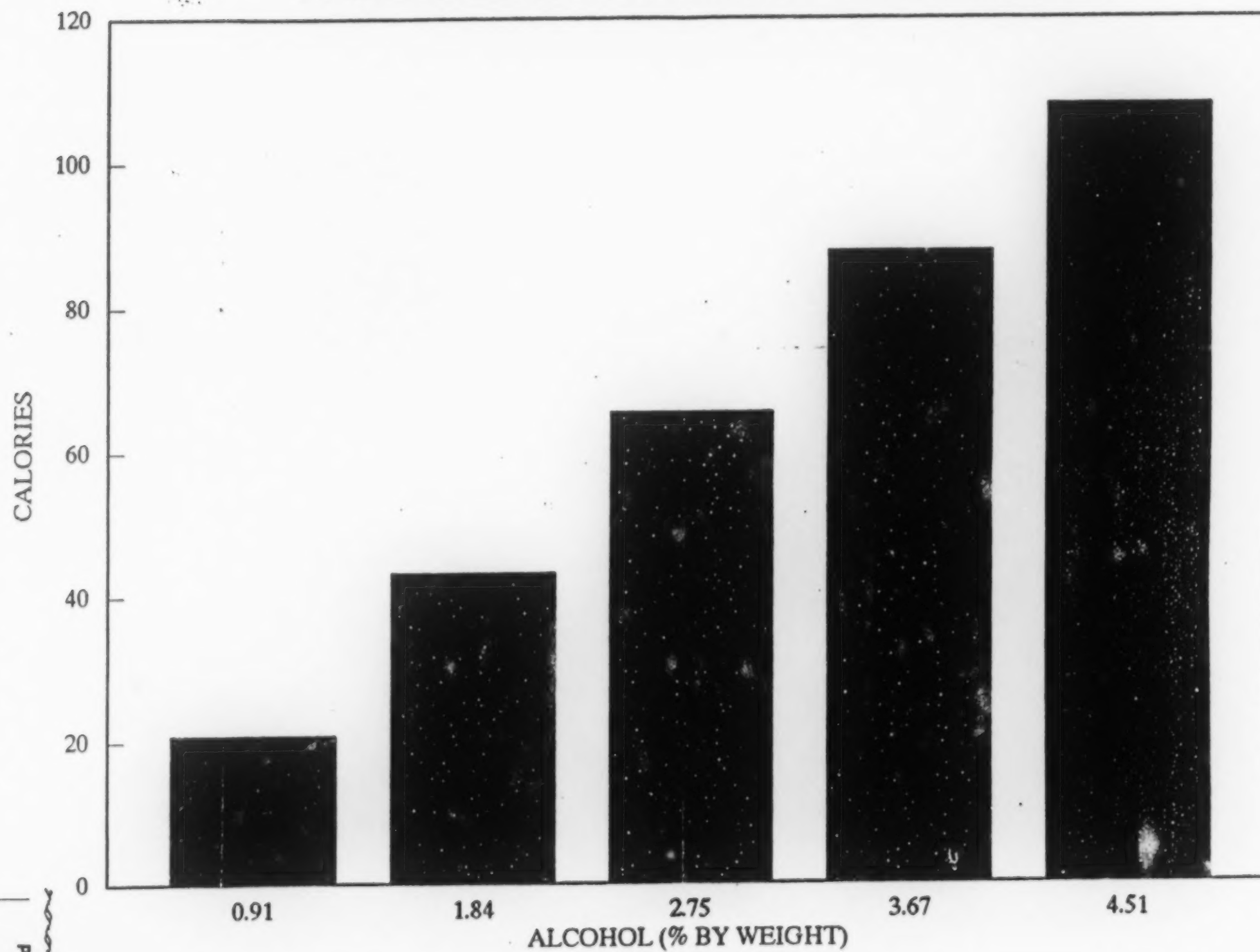
U.S. BEER VOLUME SHARE BY ALCOHOL CONTENT<sup>285</sup>  
TOP 30 BRANDS  
1991



■ SHARE OF VOLUME

PLAINTIFF  
EXHIBIT  
3  
Case# 87-2  
nonmonetary

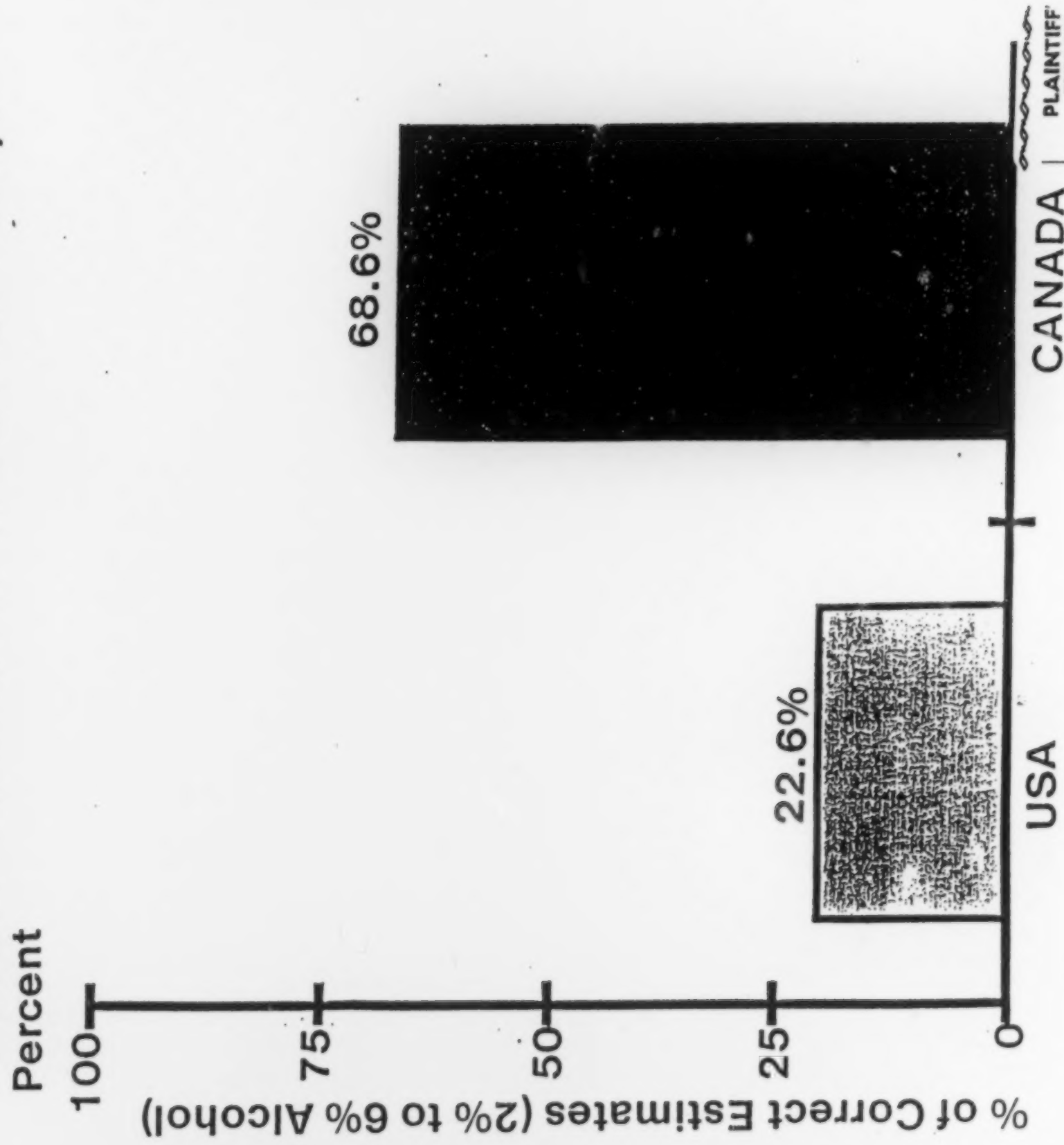
## CALORIES IN ETHANOL SOLUTIONS



# PERCENT OF CORRECT RESPONSES (2% TO 6% ALCOHOL) TO THE QUESTION:

287

“What is the approximate percent  
alcohol content of (THE BRAND OF  
BEER YOU DRINK MOST OFTEN)?”\*\*\*



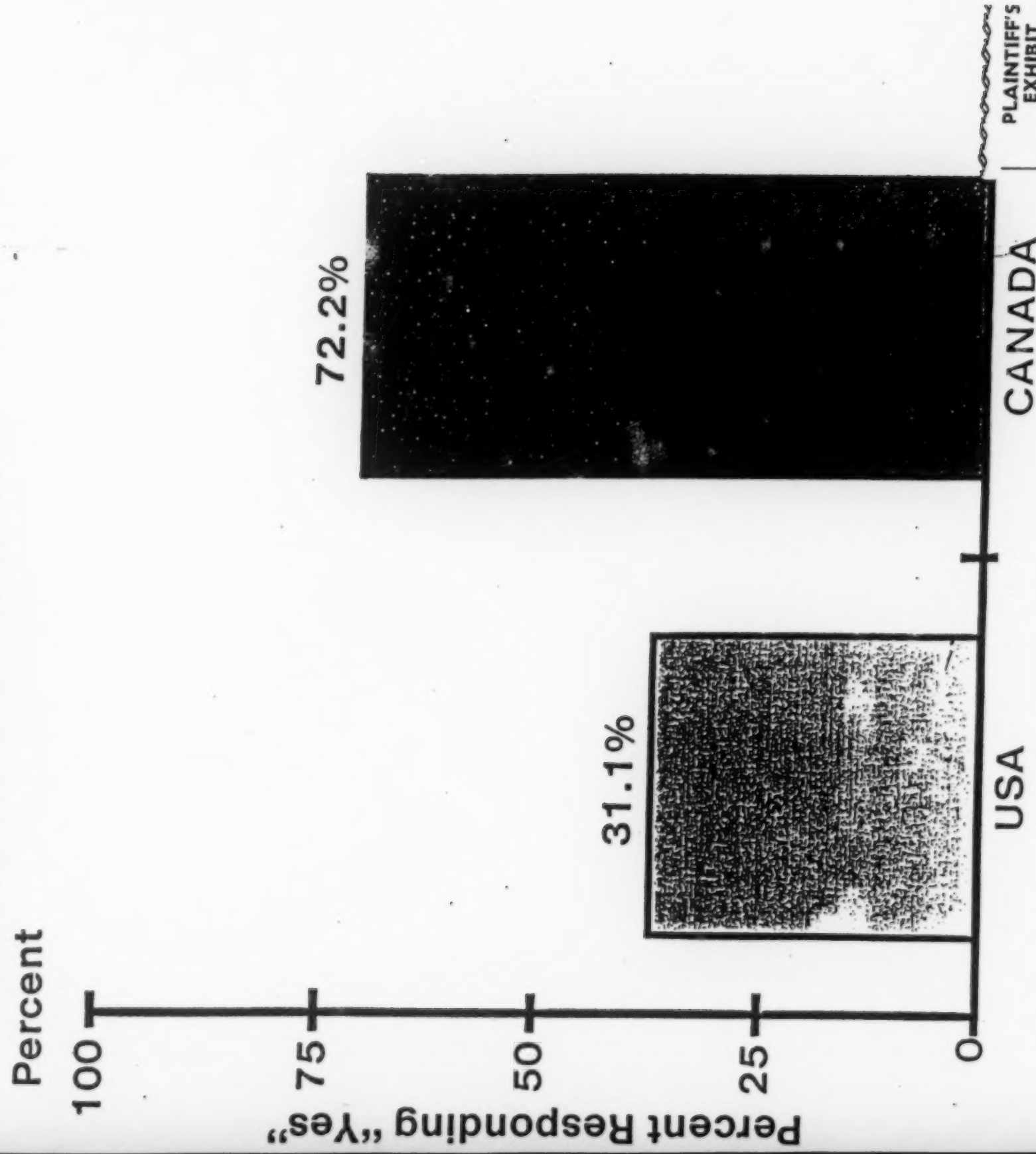
\*\*\*Among all Respondents



# PERCENT RESPONDING "YES"

## TO THE QUESTION:

"You mentioned that (Brand) is the brand of beer you drink most often. Do you know the approximate percent alcohol of this brand?"



PLAINTIFF'S  
EXHIBIT

10  
Case# 87-CV-997

[Plaintiff's Exhibit 12]

Department of Health and Human Services

OFFICE OF  
INSPECTOR GENERAL

YOUTH AND ALCOHOL:  
A NATIONAL SURVEY

DO THEY KNOW WHAT THEY'RE DRINKING?

[Logo]

Richard P. Kusserow  
INSPECTOR GENERAL

OEI-09-91-00653

\* \* \* \* \*

[1]

## INTRODUCTION

### PURPOSE

This inspection surveyed junior and senior high school (7th through 12th grade) students to determine their knowledge about alcoholic and non-alcoholic beverages.

### BACKGROUND

In response to public health concerns and the adverse health consequences of alcohol abuse, Surgeon General Antonia Novello requested that the Office of Inspector General (OIG) survey youth to determine their views and practices regarding alcohol use. These concerns mirror one of Department of Health and Human Services (HHS) Secretary Louis Sullivan's goals which is to reduce the prevalence of alcohol problems among children and youth. The

Surgeon General is particularly concerned about the similarities in the packaging of alcoholic and non-alcoholic beverages and young peoples' inability to distinguish between them. This is one of several reports prepared by the OIG relating to youth and alcohol.

*The popularity of fruit-flavored alcoholic beverages skyrocketed in the 1980s*

During the 1980s, alcoholic beverage companies introduced a variety of new products to the market. They offered consumers alcoholic beverages in a wide range of fruity flavors, vibrant colors, and attractive packaging. Introduced in 1981, wine coolers (1.5 to 6.0 percent alcohol by volume) are a mixture of wine and fruit juice or other flavoring, sometimes carbonated. Wine coolers offer consumers a sweet, fruity beverage with little or no alcohol taste. They are available in 12-ounce, screw-top bottles which are sold individually or in 4-packs. The most popular brands are Bartles & Jaymes and Seagram's.

The wine cooler market's explosive growth during its first 6 years prompted the liquor and beer industries to introduce mixed drink coolers (4.0 percent alcohol) and fruit-flavored malt beverage coolers (4.0 to 4.8 percent alcohol)<sup>1</sup> marketed in single-serve bottles. Bacardi Breezer, which looks and tastes much like a wine cooler, is an example of a mixed drink cooler. White Mountain Cooler is a malt beverage cooler available in flavors such as "Wild Raspberry," "Original Citrus," and "Cranberry Splash."

<sup>1</sup> Alcohol content of malted beverages is commonly measured in alcohol weight, rather than alcohol volume. The malted beverage coolers we observed contain 3.2 to 4.0 percent alcohol by weight.

While not new to the 1980s, fruit-flavored fortified wines became more mainstream with the controversial marketing of Cisco (20.0 percent alcohol). Fortified wines—[2] such as Thunderbird and Night Train—contain more alcohol than regular wines and historically have been considered "wino" beverages because they are inexpensive and available mainly in inner cities. Cisco offers consumers 20 percent alcohol fortified wine—4 to 5 times more than regular wine coolers—in popular wine cooler flavors such as peach, berry, and orange, marketed in bottles designed similarly to wine coolers. Cisco has become more widely available and popular than other fortified wines and now can be found displayed next to wine coolers not only in cities, but also in suburbs and smaller towns throughout the United States.

The Surgeon General has expressed an ongoing concern about Cisco because of its high alcohol content and potential for abuse. Cisco looks similar to wine coolers and has been implicated in a number of alcohol-related deaths and crimes, especially among youth. As a result, Dr. Novello has worked with the Federal Trade Commission to require Cisco to change its labeling and bottle shape, so it does not resemble a wine cooler.

While containing no alcohol, mineral water with fruit juice or flavor also became popular during the 1980s. These beverages offer a variety of fruit flavors in bottles that are very similar to the ones used for alcoholic coolers and Cisco. Brands include Sundance Sparkler and Mystic. While these alcoholic and non-alcoholic beverages offer a similar sweet, fruity flavor and are packaged and sold in attractively designed four-packs or single 12-ounce bottles, they are in fact very different. Minerals waters offer substitutes for soda pop. The coolers offer similar flavors



with 4 to 6 percent alcohol. Cisco offers the same flavors with 20 percent alcohol.

#### METHODOLOGY

We randomly selected 8 States, 2 counties per State, 2 schools per county, and 30 students per school. The States were: California, Colorado, Florida, Illinois, Louisiana, New York, Ohio, and Pennsylvania. We completed structured interviews with a total of 956 junior and senior high school students.

We purchased alcoholic and non-alcoholic beverages from stores close to each school. During the interviews, we displayed a panel of these beverages and asked each student (1) whether each beverage did or did not contain alcohol, (2) which contained the most alcohol simply by looking at the bottles, and (3) which contained the most alcohol after reading the labels. We included Cisco in all interviews regardless of whether it was available in that area.

The appendix contains a more detailed description of our methodology and beverage selection.

\* \* \* \* \*

[Illustrations Omitted in Printing]

[5]

## FINDINGS

**TWO OUT OF THREE STUDENTS CANNOT DISTINGUISH ALCOHOLIC BEVERAGES FROM NON-ALCOHOLIC BEVERAGES**

Students confused alcoholic coolers with mineral waters that are similar in color, labeling, and packaging. Also, some alcoholic coolers are not clearly labeled as alcoholic. Students were most often confused by coolers that do not state clearly on the front of their labels what kind of beverages they are. An example is Bacardi Breezer (page 7).

Students correctly identified alcoholic beverages more often when shown clearly marked, popular, and well-advertised name-brand alcoholic beverages, especially beers and Bartles & Jaymes wine coolers. More than 60 percent of the students did not distinguish between alcoholic and non-alcoholic beer—such as Sharp's and O'Doul's. Although non-alcoholic beer contains less than 0.5 percent alcohol, some students assumed these products contained the same amount of alcohol as regular beer, because the popular Miller and Anheuser-Busch slogans appear directly under the product name.

Younger students were more likely to mistake an alcoholic beverage for a non-alcoholic one. Seventy-three percent of students ages 15 and younger erred or did not know that at least one of the alcoholic beverages contained alcohol. Sixty percent of those 16 and older made the same mistake.

**PERCENT ANSWERING INCORRECTLY OR "DON'T KNOW" TO THE QUESTION, "DOES THIS CONTAIN ALCOHOL?"**

<i>Tropical Passion, Pink Passion, Purple Passion</i> (wine cooler or liquor)	61.3%
<i>Cisco</i> (fortified wine)	36.0
<i>Bacardi Breezer</i> (mixed drink cooler)	25.5
<i>White Mountain</i> (malted beverage cooler)	18.0
<i>Bartles &amp; Jaymes</i> (wine cooler)	9.6
<i>Schlitz</i> (malt liquor)	8.8
<i>Michelob</i> (beer)	4.2
<i>Miller, Miller Genuine Draft</i> (beer)	4.1
<i>Budweiser</i> (beer)	1.2
<i>Colt '45</i> (malt liquor)	0.7

[6] Students sometimes believed that mineral waters with juice contained alcohol. Several brands of mineral water now use foil labels to cover the cap. This gives them an appearance similar to some alcoholic beverages. Thirty-four percent of all students failed to identify mineral waters as non-alcoholic.

The similar appearance of alcoholic coolers and mineral waters has been used by students to fool retail clerks into selling them alcoholic beverages, according to one junior high school teacher. In one area, students place wine coolers into mineral water four-pack containers. Because of their similar appearance, the clerks fail to notice that the beverages have been switched.

On average, students were unable to distinguish between alcoholic and non-alcoholic beverages 3 out of 10 times.

\* \* \* \* \*

[14]

**RECOMMENDATIONS****THE SURGEON GENERAL SHOULD WORK WITH BEVERAGE INDUSTRY, STATE, AND FEDERAL OFFICIALS TO IMPROVE THE LABELING AND PACKAGING OF ALCOHOLIC AND NON-ALCOHOLIC BEVERAGES**

A coordinated effort should ensure that (1) total alcohol content of all beverages—including beer and malt liquor—is clearly displayed and understandable and (2) alcoholic and non-alcoholic beverages are clearly distinguishable.

In order to accomplish this, it may be necessary to seek repeal of the Federal law prohibiting disclosure of alcohol content on beer containers. Other options would be to convince States to enact legislation requiring content disclosure or to seek voluntary industry standards.

**THE SURGEON GENERAL SHOULD CONSULT WITH PUBLIC AND PRIVATE AGENCIES TO DEVELOP, IMPROVE, AND PROMOTE EDUCATIONAL PROGRAMS WHICH WOULD INCREASE STUDENT AWARENESS OF ALCOHOLIC BEVERAGES AND THEIR EFFECTS**

This recommendation is similar to one that appears in the OIG report entitled "Youth and Alcohol: A National Survey—Drinking Habits, Access, Attitudes, and Knowledge." In addition to consulting with other HHS components, the Surgeon General should work with the U.S. Departments of Education, Transportation, and Justice, the alcoholic beverage industry, and public interest groups to implement this recommendation. The educational programs should include (1) teaching students about the total alcohol content of different beverages and (2) eliminating myths about wine coolers and beer.

\* \* \* \* \*



American National Can Company will not be responsible, after the return of black and white proofs, color separations and color proofs with a customer signature, for any errors, omissions, etc., overlooked by the customer. By preparing artwork or proofs, American National Can Company assumes no responsibility for noncompliance with local, state or Federal laws and regulations including, but not limited to, the Federal Food, Drug and Cosmetic Act and the Federal Fair Packaging and Labeling Act or for conflict with the rights of third parties in connection with trademarks, designs, labels, copyrights or unfair competition, and the customer agrees to indemnify and hold American National Can Company harmless for any and all damages sustained by the American National Can Company as a result of any action by a third party based on any such grounds.

PLAINTIFF'S  
EXHIBIT

13  
Case# 87-2-977

APPROVED DATE \_\_\_\_\_

APPROVED BY \_\_\_\_\_

*RC [signature] 3/25*

TYPE  
LIMIT

PLAIN METAL

TYPE  
LIMIT

AMERICAN-NATIONAL GRAPHIC ARTS CENTER

ARTWORK 77421 3209-5  
CONTROL

CUSTOMER STROH WINSTON SALEM  
COLORS WHT GOLD LT RED DK RED

JOB ORDER  
SIZE  
B&W DATE 03-01-91

KEY

[Plaintiff's Exhibit 14]

## BEVERAGE STUDY

REPORT FOR:  
BRADLEY, CAMPBELL & CARNEY,  
ATTORNEYS AT LAW

### [1] REASONS FOR THE INVESTIGATION

Content labeling of many food and beverage products has been increasing over the years. One product which does not list its alcoholic content is beer.

C/J Research, Inc. was contacted by Bradley, Campbell & Carney and asked to conduct a study designed to determine the current level of knowledge among beer drinkers with respect to the alcohol content of beer. In addition, interest also was expressed in gathering information to help determine if and to what extent beer drinkers might desire this information as well as to determine their reasons for wanting or not wanting to know about the alcohol content of beer.

### [2] RESEARCH PROCEDURE

A total of 500 interviews were conducted with consumers (250 women and 250 men) between May 12th and May 24th, 1987. The interviews were conducted via long distance telephone lines from a centrally monitored telephone interviewing facility using a national probability sample which included telephone numbers for the forty-eight contiguous states within the United States (excluding Alaska and Hawaii). The sample used in this study is a random sample which is computer generated. A sample of this nature ensures that unlisted telephone numbers and

recently issued numbers will be included in the interviewing process.

For each interview, the interviewers were instructed to speak with a male in the household who had the most recent birthday and who was of legal drinking age (for *that* particular state) or older, (Colorado—18 years, Ohio and Wyoming—19 years, all other states—21 years). If this person was unavailable, the interviewers were instructed to speak to a female in the household who had the most recent birthday and was of legal drinking age or older. This further serves to randomize the interviewing procedure.

In order to participate, respondents had to meet a number of criteria. All respondents in the study were legal drinking age or older, and reported that they had consumed beer during the previous month.

People were excluded from participation if they were a member of a family or have a close friend who worked for an advertising agency, a marketing research firm, or a manufacturer, distributor, or retailer of beverage products.

Respondents who qualified for the study were asked, "You mentioned a moment ago that you have recently had beer to drink. What brand of beer do you drink most often?" If regular or light beer was not specified, the respondents were asked "Is that (*BRAND*) regular or light you drink most often?"

Next, the interviewers asked, "You mentioned that (*BRAND*) is the brand of beer you drink most often. Do you know the approximate percent alcohol content of this brand?" All consumers who responded "yes" to this question were further queried, "What is the approximate percent alcohol content of (*BRAND*)?" The response was recorded exactly as was stated by the respondent.

Following this, the interviewers prepared to read a list of beer brands by saying, "Now I will read the names of

some brands of beer and would like you to tell me what is the approximate percent alcohol content for each brand. What is the approximate alcohol content of (*BRAND*)?" The list of beers about which respondents were questioned is as follows: Regular Budweiser, Miller High Life, Regular Coors, Michelob, Heineken and Miller Lite. Of course, the order in which the beers were read was rotated to control order bias. If the brand of beer which the respondent stated he or she drinks most often was included in the brand list, the respondent was not asked about it again.

[3] Once this was accomplished, the respondents were asked, "Do you yourself, feel that the alcohol content of beer should or should not be shown on the bottle or can?" They then were asked, "Why do you say that?" The response was recorded exactly as stated by the respondent.

Finally, all respondents who said that the alcohol content of beer should be shown on the bottle or can were asked, "Other than just curiosity, why would you want to know the alcohol content of the beer you drink?" Again, the response was recorded exactly as stated.

#### [4] SUMMARY OF KEY FINDINGS

- Less than one-third (31.1%) of the beer drinkers interviewed for this study claim to know the approximate alcohol content of the beers they drink most often.

In total, of the beer drinkers interviewed:

- Less than one in four (22.6%) appears to actually know the content of the beer they drink most often. (NOTE: Responses ranging from 2% to 6% alcohol content have been counted as correct).
- Of those beer drinkers who claimed to know the alcohol content of the beer they drink most often, 72.9 percent were correct.

- When questioned about other brands of beer, similar findings were noted. Approximately one-fourth (21.0% to 28.6%) of the respondents mention alcohol content levels for beers considered correct. Nearly three-fourths of the respondents, did not know, were not sure, or were incorrect with respect to the alcohol content of the selected beers.
- More than 8 out of 10 (82.6%) respondents feel the alcohol content of beer should be shown on the bottle or can.
  - the primary reasons for wanting to know this information relate to a desire on the parts of many respondents to know what they are drinking. Other reasons mentioned include the use of this information to avoid drinking too much or to know when not to drive if they have had too much to drink.
- If this study were repeated one hundred times, 95 times out of 100 we would expect the results to be within 5 percentage points of these figures.



TABLE 1

[5]

Q. 2A. YOU MENTIONED THAT (BRAND Q. 1A) IS THE BRAND OF BEER YOU DRINK MOST OFTEN. DO YOU KNOW THE APPROXIMATE ALCOHOL CONTENT OF THIS BRAND?

Total Number of Respondents	(500)
Yes	31.1%*
No	63.1
Don't Know/Not Sure	5.8
	100.0%

## \*ALCOHOL CONTENT SUMMARY

Less than 2%	1.3%
2 to 6%	72.9%
Over 6%	25.2%
	100.0%

BASE: (155)

TABLE 2

[6]

Q.2B/3 WHAT IS THE APPROXIMATE PERCENT ALCOHOL CONTENT OF (BRAND RESPONDENT DRINKS MOST OFTEN/BEGIN WITH X'D BRAND)?

Brand Consumed Most Often**	Less than 2 Percent	2 to 6 Percent	More than 6 Percent	Don't Know/ Not Sure*	Number of Respondents
Regular Budweiser	0.4%	22.6%	7.8%	69.2%	(500)
Miller High Life	1.0	26.8	13.6	58.6	(500)
Regular Coors	1.4	28.2	13.0	57.4	(500)
Michelob	1.2	27.6	13.2	58.0	(500)
Heineken	0.8	26.2	13.8	59.2	(500)
Miller Lite	0.8	21.0	16.0	62.2	(500)
	1.0	28.6	10.4	60.0	(500)

\* Includes respondents who said "No" or "Don't Know/Not Sure" when asked Q. 2A "You mentioned that (BRAND Q.1A) is the brand of beer you drink most often. Do you know the approximate percent alcohol of this brand?"

\*\* All "Most Often" brands are included in this row including: Regular Budweiser, Miller High Life, Regular Coors, Michelob, Heineken, and Miller Lite.

[7]

TABLE 3

Q.4A. DO YOU, YOURSELF, FEEL THAT THE ALCOHOL CONTENT OF BEER SHOULD OR SHOULD NOT BE SHOWN ON THE BOTTLE OR CAN?

Total Number of Respondents	(500)
Should be shown	82.6%
Should not be shown	3.2
Don't Know/Not Sure	<u>14.2</u>
	100.0%

[8]

TABLE 4

Q.4B WHY DO YOU SAY THAT?\*

(By answer to Q. 4A)

	<i>Should be Shown</i>	<i>Should Not Be Shown</i>	<i>Don't Know/ Not Sure</i>
TOTAL NUMBER OF RESPONDENTS	(413)	(16)	(71)
AMOUNT OF ALCOHOL CONTENT AND DRINKING ISSUES—NET	59.6%	6.3%	2.8%
(Will/Would know what you are drinking; Will/Would know alcohol con- tent you are drinking; Should know amount of alcohol/what you are drinking)			
INFORMATION ISSUES—NET	16.2	—	1.4

TABLE 4—Continued

	<i>Should be Shown</i>	<i>Should Not Be Shown</i>	<i>Don't Know/ Not Sure</i>
(For information purposes; other alcoholic beverages show content)			
CONSUMER CONCERNS— NET	5.6	—	—
(Drinking and driving men- tions; health mentions)			
DOESN'T MATTER/NOT IN- TERESTED NO PAR- TICULAR REASON—NET	1.7	43.8	69.0
OTHER—NET	1.7	18.8	8.5
Miscellaneous Mentions	9.9	25.0	5.6
Don't Know	5.3	6.3	12.7

\* See appendix for additional detail

[9]

TABLE 5

Q.4C OTHER THAN JUST CURIOSITY, WHY  
WOULD YOU WANT TO KNOW THE  
ALCOHOL CONTENT OF THE BEER YOU  
DRINK?

— ASKED AMONG THOSE RESPONDENTS  
WHO SAID THE ALCOHOL CONTENT OF  
BEER SHOULD BE SHOWN (Q. 4A)

NUMBER OF RESPONDENTS (413)

AMOUNT OF ALCOHOL—CONTENT  
AND DRINKING ISSUES—NET 39.7

(Will/Would know what you are drinking;  
Let people know how much they can  
drink; Would know alcohol content you  
are drinking)

CONSUMER CONCERNS—NET 17.4

(Drinking and driving mentions; health  
mentions)

DOESN'T MATTER/NOT IN-  
TERESTED/NO PARTICULAR  
REASON—NET 15.5

INFORMATION ISSUES—NET 11.4

(For information purposes; compare dif-  
ferent beverages, brands; Would help  
in selecting the beer to drink)



TABLE 5 - Continued

OTHER - NET	9.4
Nothing	0.2
Miscellaneous Mentions	3.1
Don't Know	3.1

\* See appendix for additional detail.

\* \* \* \* \*

## [DEFENDANTS' EXHIBIT B]

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO  
AND FIREARMS

221 Main Street, 11th Floor  
San Francisco, California 94105-1992

CC:SF:LLN  
11242

[Oct. 2, 1991]

*CERTIFIED MAIL - RRR*

Mr. Minott Wessinger, President  
McKenzie River Corporation  
330 Townsend Street, Suite 3250  
San Francisco, California 94107

Re: St. Ides Malt Liquor Advertising

Dear Mr. Wessinger:

As you know, the Bureau has conducted an inspection concerning your company's radio and television advertising of St. Ides malt liquor by the rap musician, Ice Cube. Our inspection disclosed that McKenzie River was responsible for the airing of seven radio advertisements and two television advertisements in 10 cities, New Jersey and the District of Columbia between August 1990 and July 1991.

We have reviewed these advertisements and have determined that phrases in some of these advertisements are disparaging of the competitor's product and other advertisements contain statements likely to be considered as statements of the alcohol content of St. Ides malt liquor. Such advertisements violate 27 U.S.C. § 205(f) and 27 C.F.R. §§ 7.54(a) (2) and 7.54(c). For example, the

"Crooked I" radio advertisement contains the phrase, "Forget 8 ball, that beer makes you earl." This is a disparaging reference to Pabst's Olde English 800. The "King Tee's Beer Stand" radio advertisement contains the phrase, "It'll put hair on your chest." This is a statement likely to be considered as a statement of alcohol content. These examples are only representative, other advertisements contain similar violative phrases.

We are contemplating the issuance of an order to show cause why your wholesaler's Federal Alcohol Administration Act basic wholesaler's permit should not be suspended based upon these advertising violations.

Pursuant to 27 C.F.R. § 200.37, we hereby offer you an opportunity to attend a conference in this office to discuss the facts and arguments concerning these violations and to submit offers of settlement.

If you wish, you may be represented at this conference by an attorney or other person and we are enclosing ATF F 1534, Power of Attorney, which you should complete if you wish such a representative. To arrange a date and time for the conference, please contact ATF Specialist Susan Hill at (415) 744-7011. If you do not contact Ms. Hill within 15 days of your receipt of this letter, we will issue an order to show cause.

Sincerely yours,

/s/ HARRY J. ADLER

Harry J. Adler  
Regional Director (Compliance)

Enclosures

[DEFENDANTS' EXHIBIT C]

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO  
AND FIREARMS

221 Main Street, 11th Floor  
San Francisco, California 94105-1992

CC:SF:LLN  
11242

[Nov. 26, 1991]

REGISTERED MAIL - RRR

Mr. Minott Wessinger, President  
McKenzie River Corporation  
330 Townsend Street, Suite 3250  
San Francisco, California 94107

Dear Mr. Wessinger:

In connection with the conference held in this office on October 29, 1991, we are hereby serving you with an Order to Show Cause (Form 5000.6) which sets forth the basis for the agreed upon stipulated suspension of your Wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*

We have agreed that a suspension of three days is appropriate in this case. In order to accomplish the agreed upon suspension, it will be necessary for you to waive your right to a hearing and your right to file an answer to the Order to Show Cause. The enclosed Suspension Agreement will accomplish these waivers. Please sign and date this agreement and return it to this office. Once the signed agreement is received in this office, I will issue my decision and an order suspending your permit for the agreed upon period. We will provide you at least fifteen days notice pri-

or to the imposition of the suspension.

You should be aware that if a permittee elects to contest the imposition of a suspension, the following regulations apply. Section 200.60 of Title 27, Code of Federal Regulations, provides that if a hearing is desired, a written request for such a hearing must be submitted to the regional director (Compliance) within 15 days after receipt of an Order. Section 200.64 of Title 27, Code of Federal Regulations, provides that if a such a hearing is requested, a written answer shall be filed with the administrative law judge and served upon the regional director (Compliance) within 15 days after service of the Order. At a hearing, a permittee may be represented by counsel, has the right to present evidence through testimony and documents, and to examine and cross-examine witnesses as provided by Title 27, Code of Federal Regulations, Sections 200.31 and 200.83. By accepting the terms of the Settlement Agreement, you will waive the application of these regulations.

Since the resolution of this matter also includes the submission of a \$15,000 monetary offer in compromise, we are also enclosing copies of ATF F 5640.2, Offer in Compromise, for you to complete and return to this office. With respect to section three of the form, we are enclosing a list of the violations to be comprised which you may simply reference in section three and attach to the form. You should complete all the remaining sections on the form and return it to this office with the remittance. You will subsequently be advised in writing regarding the acceptance of your offer.

If you have any questions, please contact Larry Nickell at (415) 744-9437.

Sincerely yours,

/s/ HARRY J. ADLER

Harry J. Adler  
Regional Director (Compliance)

Enclosures

cc: Paul Crotty, Esquire  
Donovan Leisure Newton & Irvine  
with enclosures

\* \* \* \* \*



ATT F 5000.6

## I.

On 40 occasions on or about and between November 1990 and May 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "Crooked I Revised" which contained the lyric "Forget 8 ball, that beer makes you earl" on radio station WPGC in Washington, D.C. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(a) (2) as the advertisement disparaged a competitor's product, Olde English 800 malt liquor.

## II.

On 36 occasions on or about and between March and July 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "Do You Like" which contained the lyric "What is this, some more bullshhh...Took a sip and had to spit, 'cause I ain't with the beer called the OE" on radio stations WJLB and WGPR in Detroit, Michigan. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(a) (2) as the advertisement disparaged a competitor's product, Olde English 800 malt liquor.

## III.

On 101 occasions on or about and between August 1990 and May 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "King T's Beer Stand" which contained the lyric "And it will put hair on your chest" on radio stations WRKS and WBLS in New York, New York. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(c) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

## IV.

On 55 occasions on or about December 1990, McKenzie River Corporation caused the airing of a radio advertisement entitled "Christmas 1990" which contained the lyric "It'll probably make you faint, and you'll paint the town red, After taking a forty dog to the head" on radio stations WRKS and WBLA in New York, New York. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(a) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

## V.

On 147 occasions on or about and between March and July 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "Do You Like" which contained the lyric "You looked and it was gone, grabbed me a 40 just to get my buzz on, 'Cause I needed just a little more kick, hooked like a fish after just one sip" on radio stations WRKS and WBLS in New York, New York; WJLB and WGPR in Detroit, Michigan; and WUSL and WDAS in Philadelphia, Pennsylvania. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(c) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

## VI.

On 255 occasions on or about and between October 1990 and June 1991, McKenzie River Corporation caused the airing of a television advertisement entitled "Ice Cube at the Apollo" which contained the lyric "And it will put hair on your chest" on television stations WNYU, Paragon Cable, and Gateway Cable in New York, New York and WPHL, Metrobase, Comcast Cable, Cable Ad Net, and

TKR Hamilton in Philadelphia, Pennsylvania. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(c) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

Accordingly, the Regional Director (Compliance) has reason to believe, and does believe, that McKenzie River Corporation has willfully not conformed its wholesaling operations with the provisions of law and regulations and further believes that the Corporation's Basic Permit should be suspended pursuant to 27 U.S.C. § 204(e) and 27 C.F.R. Part 200.

#### Suspension Agreement

1. McKenzie River Corporation, CA-P-6482, through its President, Minott Wessinger, waives its right to file an answer and its right to a hearing and admits the allegations contained in the Order to Show Cause, docket no. W-FA-405.
2. McKenzie River Corporation, CA-P-6482, through its President, Minott Wessinger, and the Regional Director (Compliance) agree that the wholesaler's basic permit issued to McKenzie River Corporation will be suspended for a period of three (3) days.
3. The Regional Director (Compliance) will issue an Order suspending the wholesaler's basic permit issued to McKenzie River Corporation for a period of three (3) days.

12-9-91      /s/ MINOTT WESSINGER  
 Date                      Minott Wessinger, President  
                                  McKenzie River Corporation

11/21/91      /s/ LARRY L. NICKELL  
 Date                      Larry L. Nickell  
                                  Attorney for the Government

\* \* \* \* \*

## [DEFENDANTS' EXHIBIT D]

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO  
AND FIREARMS221 Main Street, 11th Floor  
San Francisco, California 94105-1992

[JAN 10, 1992]

CC:SF:LLN  
11242

## REGISTERED MAIL — RRR

Mr. Minott Wessinger, President  
McKenzie River Corporation  
330 Townsend Street, Suite 3250  
San Francisco, California 94107

Dear Mr. Wessinger:

Enclosed with this letter is my initial decision and order (ATF F 5000.5) suspending your Wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.* This order accomplishes the agreed upon stipulated suspension of your permit.

The suspension is for a period of three days starting on February 3, 1992, and continuing through February 5, 1992. The privileges conferred by your permit allow your company to engage in the business of purchasing for resale at wholesale malt beverages and allow your company to receive, sell, offer or deliver for sale, contract to sell, or ship, directly or indirectly through an affiliate, malt beverages.

As we discussed in our meeting with you on October 29, 1991, during this three day suspension period, in practical terms, McKenzie River Corporation representatives may not solicit distributors to order malt beverages. Additionally, McKenzie River Corporation's affiliate, G. Heileman Brewing Company of Portland, Oregon, which acts as a distribution and collection agent for your company, may not fill orders for McKenzie River malt beverage products by shipping such products. The G. Heileman Brewing Company may receive orders for McKenzie River malt beverage products and produce and bottle such products. You should confer with G. Heileman Brewing Company and the distributors of McKenzie River malt beverage products to insure compliance with the terms of this suspension.

With the acceptance of your company's monetary offer in compromise for advertising violations committed in Pennsylvania, Washington, Ohio, Maryland, Oregon, New Jersey and Washington D.C., and the imposition of this suspension, this matter now comes to a close. We encourage you to contact us at any time with questions you may have regarding the federal regulation of malt beverage wholesaling activities and trust that the resolution of this case will enhance your company's commitment to compliance with such regulation.

If you have any questions regarding the suspension, please do not hesitate to contact us.

Sincerely yours,

/s/ THOMAS R. CROWE

for Harry J. Adler  
Regional Director (Compliance)

Enclosures

cc: Paul Crotty, Esquire  
Donovan Leisure Newton & Irvine  
with enclosures

\*\*\*\*\*



## INFORMATION REFERRAL — FAA

SUBJECT (Name, Address, Permit Number (if applicable))

Columbia Distributing  
2448 NW 28th  
Portland, Or

2. PURPOSE OF REFERRAL

☒ INFORMATION REPORT  
☐ COMPLAINT RESOLVED  
WITHOUT INSPECTION

SOURCE (If anonymous, so state)

Bernard J. Kipp, Special Inspector Portland, POD

EVALUATION OF SOURCE

☒ RELIABLE ☐ FAIRLY RELIABLE ☐ UNRELIABLE ☐ UNKNOWN

EVALUATION OF INFORMATION

☒ CONFIRMED ☐ PROBABLY TRUE ☐ POSSIBLY TRUE ☐ IMPROBABLE ☐ UNABLE TO  
ESTIMATE

EXPLANATION OF INFORMATION OR COMPLAINT

The attached sticker was placed on six packs of St. Ides malt beverage. This product is marketed in at least three western states (Oregon, Washington, and Calif.) and is produced by Blitz Weinhardt brewery. This sticker seems to be in direct conflict with 27 CFR 7.29 (f). Further, this matter has been discussed with St. Ides Brewing Co. previously. It appears the stickers are being placed on the packages by the wholesaler.



SUBMITTED BY (Name and Title)

Bernard J. Kipp, Special Insp.

8. OFFICE

Portland, Or.

9. DATE

5/18/90

REVIEWER'S COMMENTS

☐ NO COMMENT

[Defendants' Exhibit O, at p. 2]

00000002

00000000

REVIEWED BY (Name and Title)

12. OFFICE

13. DATE

INSTRUCTIONS - Please forward a copy with attachments to the Training Branch. Please see additional instructions on reverse.

PART I - IDENTIFICATION DATA									
COMPANY NAME, STREET ADDRESS, CITY, STATE, ZIP CODE					TYPE OF BUSINESS				
McKenzie River Corp.					Wholesaler				
330 Townsend Street					A/O				
San Francisco, CA 94107					San Francisco				
					COMPLAINT				
					<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO				
AFFECTED REGIONS					SOURCE				
N <input type="checkbox"/> A <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>					Pabst Brewing Co.				
FORM DATE									
10/9/90									
EVALUATION OF SOURCE (Check one)									
<input checked="" type="checkbox"/> RELIABLE <input type="checkbox"/> FAIRLY RELIABLE <input type="checkbox"/> UNRELIABLE <input type="checkbox"/> UNKNOWN									
EVALUATION OF INFORMATION (Check one)									
<input type="checkbox"/> CONFIRMED <input checked="" type="checkbox"/> PROBABLY TRUE <input type="checkbox"/> POSSIBLY TRUE <input type="checkbox"/> IMPROBABLE <input type="checkbox"/> UNABLE TO ESTIMATE									
PRODUCTS PROMOTED					PRODUCTS EXCLUDED				
St. Ides Malt Beverage									
KEYWORDS					<input type="checkbox"/> EXCLUSIVE OUTLET <input type="checkbox"/> TIED HOUSE <input checked="" type="checkbox"/> ADVERTISING <input type="checkbox"/> LABELING <input type="checkbox"/> CONSIGNMENT SALES <input type="checkbox"/> COMMERCIAL BRIBERY <input type="checkbox"/> FRAUD				
SUBMITTED BY (Name of Inspector/Specialist)					<input checked="" type="checkbox"/> INSPECTOR <input type="checkbox"/> SPECIALIST				
Bernard J. Kipp									
ASSOCIATES									

PART II - DESCRIPTIVE DATA

DESCRIPTION

The attached correspondence indicates that McKenzie River Corp. has been using the attached advertisements which contain specific reference to alcoholic strength in violation of 27 CFR 7.29(F). The ads (Attachment #1) were distributed in the New York Metropolitan Area recently. These same ads were distributed in California in 1988 until Mr. Wessinger (Pres. of McKenzie River) was contacted by ATF and agreed to discontinue their use. Accord to the letters dated 9/20/90 & 9/27/90 (Attachments 2 & 3) has agreed to stop using them in New York however he may use them elsewhere.

PART III - RECOMMENDATION DATA		
REVIEWED BY	PRIORITY	
INVESTIGATION RECOMMENDED BY REVIEWER	INVESTIGATION ASSIGNED BY SUPERVISOR	
<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO	
COMMENTS		

DEFENDANT'S  
EXHIBIT  
P

87-Z-977

☐ YES ☐ NO

LICS SYSTEM REFERENCE NUMBER 00000000

PREVIOUS EDITION IS OBSOLETE

00000000

[Defendants' Exhibit P, at p. 3]

[Logo of Pabst Brewing Company]

100 Shoreline Hwy • Bldg. B, Suite 395 •  
Mill Valley, CA 94941

September 19, 1990

Mr. Jon Johnson  
McKenzie River Corp.  
330 Townsend Street  
San Francisco, CA 94107

Re: St. Ides Malt Liquor Advertisements

Dear Mr. Johnson:

It has come to our attention that you are engaging in what we believe to be deceptive and misleading advertising in the New York metropolitan area with regard to your St. Ides Malt Liquor. As indicated by the attached, you are representing to the public that St. Ides Malt Liquor is a product of the Pabst Brewing Company, manufacturers and holders of the trademark for Olde English 800 Malt Liquor. As this company has absolutely no connection whatsoever with St. Ides, we ask that you forthwith cease and desist from further advertising activities suggesting a connection between our company and your product.

Very truly yours,

/s/ EUGENE J. TOLER

Eugene J. Toler  
Corporate Legal Counsel

EJT:lj  
Enclosure

cc: Lutz E. Issleib  
William M. Bitting, Esq.  
Barry Bumgarner  
Mr. Bernard Kipp, BATF – Portland, Oregon  
Bureau of Alcohol, Tobacco & Firearms,  
San Francisco, CA  
Federal Trade Commission  
New York State Liquor Authority

G7-185





# ST IDES<sup>™</sup>

## PREMIUM MALT LIQUOR



To Order  
Call Toll Free  
Manhattan Beer Distributors  
1-800-233-7462

### St. Ides - The New #1

1. Strongest Malt Liquor in America. (6.5% Alcohol/Wt.)
2. Smoothest/Best Tasting Malt Liquor in America - Gold Medal Winner, Great American Beer Festival VIII.
3. From the same people who brought you Olde English 800.

### Pricing

Price	\$14.55	\$14.95
Deposit	\$ 1.20	\$ 0.70
Total Complete	\$15.75	\$15.65

### Support

1. Advertising: T.V. and Radio (KISS 98.7FM & WBLS 107.5FM)
2. P.O.S (Posters, Shelf Strips, Cold Box Stickers)

3/1/90

[Defendants' Exhibit P, at p. 4]

00000004

00000284

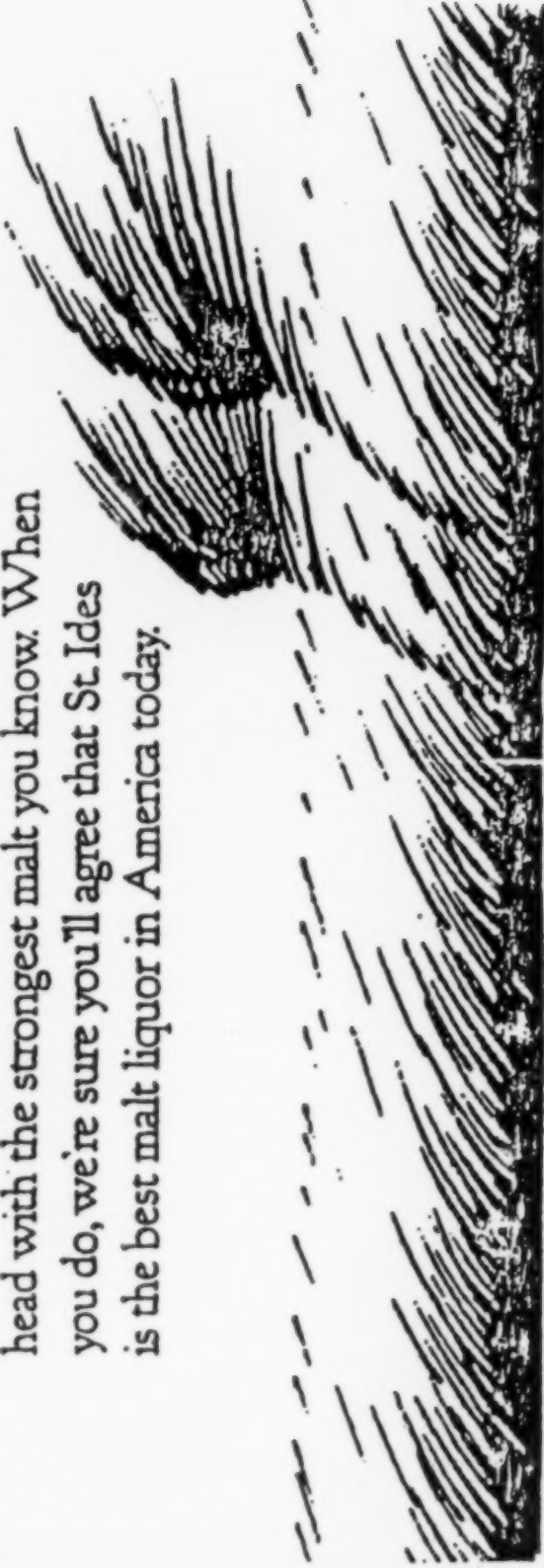
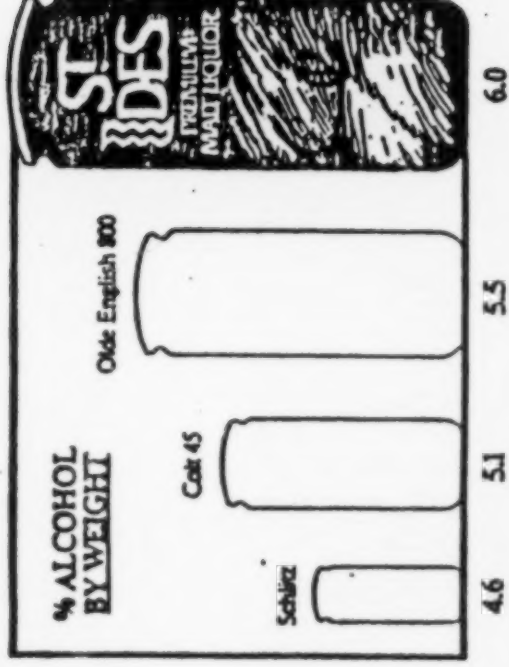
# THE ST. IDES STORY.

St. Ides is the first real breakthrough in malt liquors since 1965. It's brewed by the people who first brought you Olde English 800, only now we've raised the stakes. St. Ides is now without exception—the strongest malt brewed in America.

But what's truly amazing about St. Ides is taste.

Usually when a malt liquor is exceptionally strong, it tastes really harsh. St. Ides, however, is made according to a special, secret recipe from the Caribbean that makes it taste unbelievably smooth—as smooth as an expensive imported beer.

But don't just take our word for it. Compare St. Ides head to head with the strongest malt you know. When you do, we're sure you'll agree that St. Ides is the best malt liquor in America today.



[Defendants' Exhibit P, at p. 6]

00000006

00000286

% ALCOHOL  
BY WEIGHT

STIDES

Olde English 800

5.5

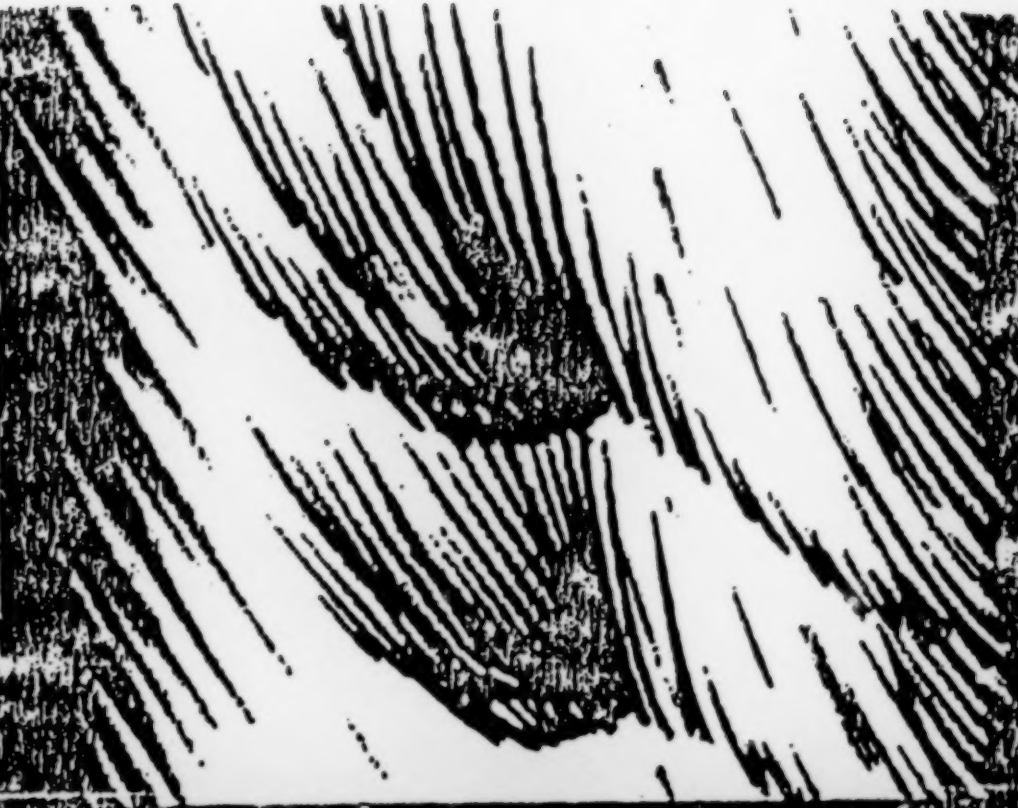
Colt 45

5.1

Schlitz

4.6

THE  
STRONGEST  
MALT MONEY  
CAN BUY.



STIDES  
PREMIUM MALT LIQUOR

© St. Ides Brewing Company, Portland, Oregon

[Defendants' Exhibit P, at p. 7]

00000007

00000287



[Defendants' Exhibit Q, at p. 1]

[FEB 6, 1989]

Eugene J. Toler  
Corporate Legal Counsel  
Pabst Brewing Company  
P.O. Box 992  
Corte Madera, California 94925

Dear Mr. Toler:

This is in reference to your letter dated December 21, 1988, regarding an advertisement for St. Ides Malt Liquor. We apologize for taking an undue amount of time in responding to your letter.

We have contacted the McKenzie River Corporation regarding this matter and will take whatever action necessary to assure compliance with the Federal Alcohol Administration Act.

Thank you for bringing this matter to our attention and if we can be of further assistance, please feel free to contact us.

Sincerely yours,

Jerry Bowerman  
Assistant Chief, Product Compliance Branch

[Defendants' Exhibit Q, at p. 2]

[Logo Omitted]

PABST BREWING COMPANY  
P.O. BOX 992 • CORTE MADERA,  
CALIFORNIA 94925

December 21, 1988

Mr. P. Orozco  
Bureau of Alcohol, Tobacco & Firearms  
221 Main Street, Eleventh Floor  
San Francisco, CA 94105

Re: St. Ides Premium Malt Liquor

Dear Mr. Orozco:

This has further reference to my letter to you of October 28, 1988 regarding the above subject (copy enclosed). We have yet to receive your formal response to our complaint regarding the advertising practices of St. Ides wherein they list the alcoholic content of not only their product but others as well.

I enclose a copy of another advertisement for this product which was found in a local retail establishment this past week. It is obvious that St. Ides does not intend to discontinue this advertising which we had been under the impression was improper and illegal.

We would appreciate the Bureau's review of the en-

closed materials and advice as to whether you believe the advertising is improper.

Very truly yours,

/s/ GENE TOLER

Eugene J. Toler  
Corporate Legal Counsel

EJT:lj  
Enclosures

cc: Lutz E. Issleib

GT8-395

\* \* \* \* \*

# THE ST. IDES STORY.

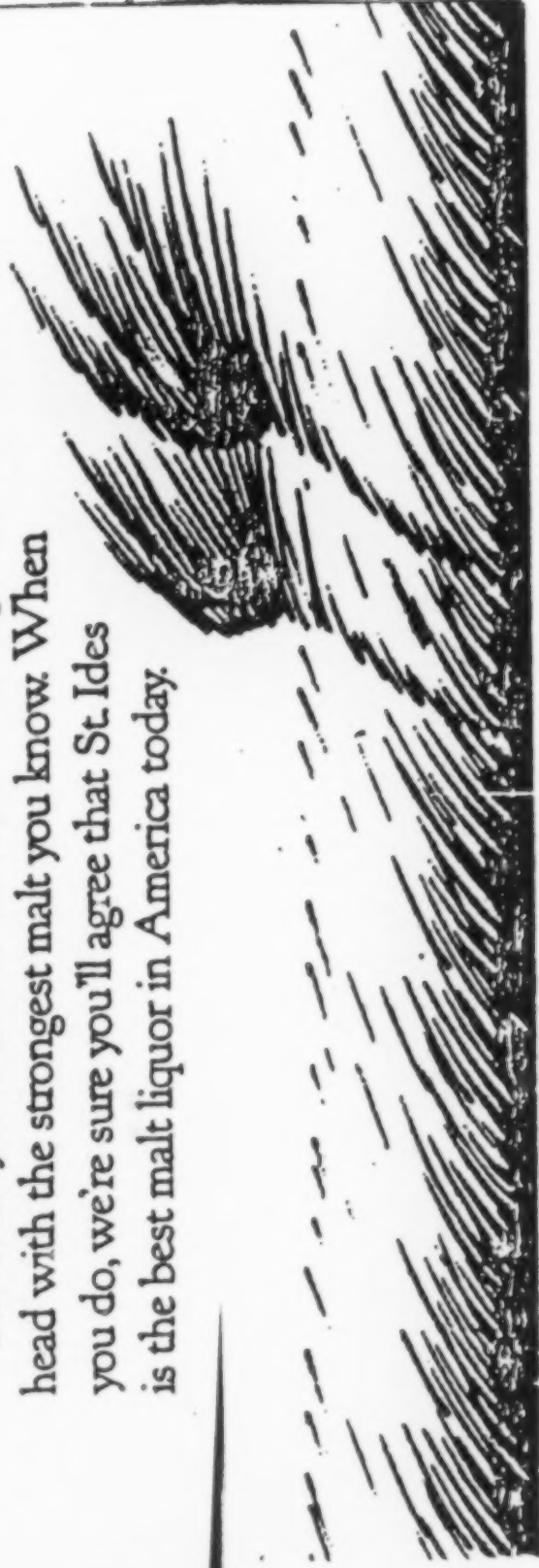
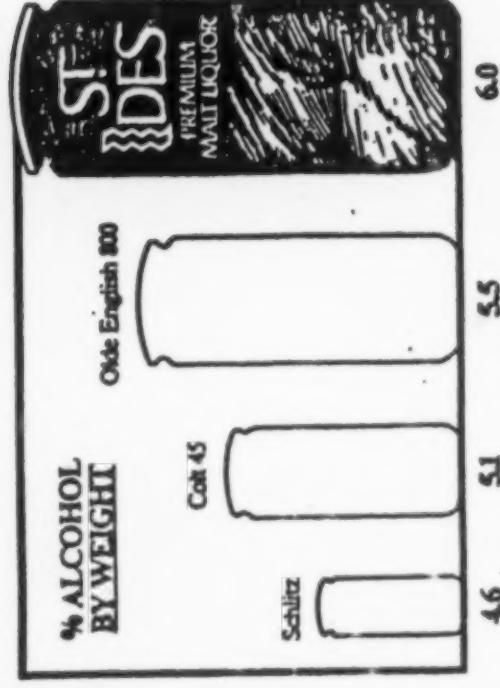
St. Ides is the first real breakthrough in malt liquors since 1965. It's brewed by the people who first brought you Olde English 800, only now we've raised the stakes. St. Ides is now without exception—the strongest malt brewed in America.

But what's truly amazing about St. Ides is taste.

Usually when a malt liquor is exceptionally strong, it tastes really harsh. St. Ides,

however, is made according to a special, secret recipe from the Caribbean that makes it taste unbelievably smooth—as smooth as an expensive imported beer.

But don't just take our word for it. Compare St. Ides head to head with the strongest malt you know. When you do, we're sure you'll agree that St. Ides is the best malt liquor in America today.



[Defendants' Exhibit Q, at p. 3]

00000003  
00000066



[Defendants' Exhibit T, at p. 10]

[Logo Omitted]

THE STROH BREWERY COMPANY  
100 RIVER PLACE  
DETROIT, MICHIGAN 48207 — [Illegible]  
[Illegible]

September 28, 1988

Mr. Daniel Black  
Chief of Industrial Compliance Division  
Department of Treasury  
Bureau of Alcohol, Tobacco and firearms  
Washington, DC 20226

Dear Mr. Black:

Attached please find an ad that appeared in the August, 1988 edition of the "Beverage Beacon/Ledger". This publication is distributed in the State of California. This advertisement of St. Ides makes suggestions as to the strength of the product in that it indicates that it is the #1 strongest malt liquor.

We have contacted the State of California regarding this matter and they have informed us that they have no statutes to prohibit this type of advertising unless it can be proved that the ads are false or misleading.

It is our feeling that this type of overt reference to extreme alcoholic strength is potentially damaging to the malt beverage industry.

We are curious to see if any action will be forthcoming from the BATF.

Sincerely,

/s/ HENRY M. GOETZ

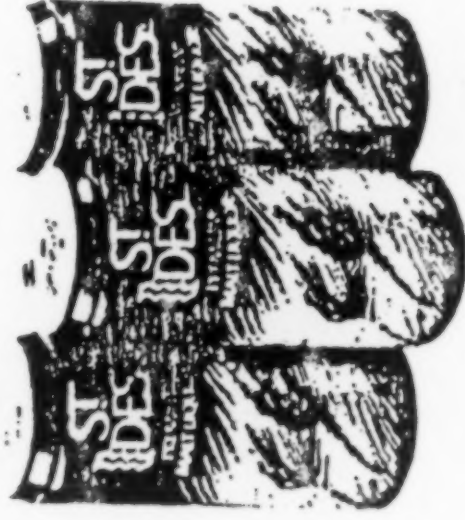
Henry M. Goetz

National Director of State Affairs

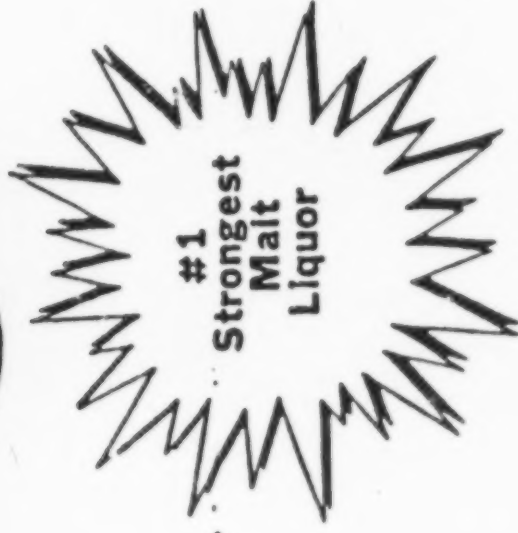
HMG/AMD/jmk

The McKenzie River Corporation®  
Is Proud To Introduce

**ST  
IDES**



**PREMIUM  
MALT LIQUEUR**



**To The  
Southern California Area**

**Interested Distributors Call  
(213) 639-5497**

**IT WILL  
BLOW YOU AWAY.**



**STEVE MCQUEEN**  
Regional Sales Manager

[Defendants' Exhibit T, at p.11]

00000331  
00000011



[Defendants' Exhibit AH, at p. 1]

[Bureau of Alcohol, Tobacco and Firearms]

[JUN 30, 1986]

C:I:P:JW  
5130/1869

Mr. Donald S. McDonald  
Anheuser-Busch Companies  
One Busch Place  
St. Louis, Missouri 63118-1852

Dear Mr. McDonald:

Thank you for your letter of May 29, 1986, regarding several cards found at various retail outlets which contain comparisons of alcohol content for several brands of malt beverages. In your letter you indicated that several Coors wholesalers and possible Coors employees are distributing the cards.

We appreciate you bringing this to our attention. We are looking into this matter as the distribution of such cards is a possible violation of the Federal Alcohol Administration Act.

If you have any further questions, please feel free to contact us.

Sincerely yours,  
Norris L. Alford  
Chief, Product Compliance Branch

[Defendants' Exhibit AH, at p. 2]

[Logo Omitted]

ANHEUSER-BUSCH COMPANIES

May 29, 1986

Mr. William T. Drake  
Deputy Director  
Bureau of Alcohol, Tobacco & Firearms  
12th & Pennsylvania Avenues, N.W.  
Washington, D.C. 20226

Re: Coors Advertising

Dear Bill:

The attached copies of cards have been picked up by Anheuser-Busch in various retail outlets around the country. We understand that various Coors wholesalers and perhaps Coors employees are distributing these cards.

I believe that the cards constitute a violation of the FAA Act which precludes alcohol content labeling and advertising unless required by state law. Of interest is the attached statement of the Ways and Means Committee on July 17, 1935 when the FAA Act was passed, which shows that Congress feared just this kind of advertising.

Anheuser-Busch would request that you investigate the matter and have the practice stopped if you agree that it is a violation of the law.

Very truly yours,

/s/ D. S. McDONALD  
Donald S. McDonald

PRODUCT	ALCOHOLIC CONTENT
COORS LIGHT	3.29%
BUD LIGHT	2.75%
MILLER LITE	3.25%
STROH'S LITE	3.37%

#1

PRODUCT	ALCOHOLIC CONTENT
COORS	3.74%
BUD	3.66%
MILLER	3.56%
STROH'S	3.48%

PRODUCT	ALCOHOLIC CONTENT
COORS LIGHT	3.29%
BUD LIGHT	2.75%
MILLER LITE	3.25%

#2

PRODUCT	ALCOHOLIC CONTENT
COORS EXTRA GOLD	3.85%
BUD	3.66%
MILLER	3.56%
COORS	3.74%

[Defendants' Exhibit AH, at p. 31]

00000133

## [DEFENDANTS' EXHIBIT AJ]

[BUREAU OF ALCOHOL, TOBACCO &amp; FIREARMS]

[AUGUST 1, 1991]

C:I:S:KTF

5190

Mr. Charles W. Schmid  
Senior Vice President, Marketing  
Miller Brewing Company  
3939 West Highland Boulevard  
Milwaukee, WI 53208

Dear Mr. Schmid:

It has recently come to our attention that your 1991 point-of-sale materials for "Lowenbrau" malt beverage products contains the word "strong" and is used to describe the products. In addition, it is our understanding that your television commercials for these same products also contains several references wherein the word "strong" is also used to describe the products.

Pursuant to 27 U.S.C. Section 205(f), it is unlawful for a brewer to publish or cause to be published in any newspaper, periodical or other publication, or by any sign or outdoor advertisement or to disseminate or to cause to be disseminated by broadcast any advertisement which contains statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages. The regulation at 27 C.F.R. Section 7.54(c) specifically states that malt beverage advertisements shall not contain the words "strong," "high test," or any similar words or statements likely to be considered as statements of alcohol content, except where required by State law.



In addition, pursuant to section 205(f) and the regulation at 27 C.F.R. Section 7.54(a), malt beverage advertisements shall not contain any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly or indirectly, or by ambiguity, omission, or inference, or by the addition of irrelevant scientific, or technical matter, tends to create a misleading impression.

We have determined that the 1991 point-of-sale materials for Lowenbrau malt beverage products and the television commercial for these products are in violation of the above provisions. In our view, the word "Strong" in these advertisements is a representation of alcoholic content or strength or are likely to be considered as such by the consumer. Furthermore, we believe that your use of the word "Strong" when viewed in connection with the advertisements' graphics, is misleading since it conveys the erroneous impression that use of the product is conducive to physical strength or prowess.

Therefore, we are advising your company to withdraw within ten (10) days from receipt of this letter the above advertisements and any ads with similar wording from radio or television broadcasting or any other means of circulation. In addition, we request that you advise us of the steps that have been taken by your company to stop these advertisements as well as the steps that you will take to prevent any recurrence of such advertising.

We encourage your voluntary cooperation in withdrawing the "Lowenbrau Strong Character" advertisements and any advertisements which contain the word "Strong" or any similar words or statements.

Sincerely yours,

[illegible]

\* \* \* \* \*

[SEAL OMITTED]

MILLER BREWING COMPANY  
3939 WEST HIGHLAND BOULEVARD  
MILWAUKEE, WISCONSIN 53201-0482 •  
(414) 931-2000

Mr. Thomas J. Skora  
Chief, Market Compliance Branch  
Bureau of Alcohol, Tobacco and Firearms  
650 Massachusetts Avenue, N.W.  
Washington, D.C. 20226

Dear Tom:

Re: Lowenbrau "Strong Character" Campaign

This letter will confirm our discussions on August 22, 1991 concerning the termination of the Lowenbrau "strong character" campaign by Miller. As pointed out, Miller is in the process of developing a replacement campaign for Lowenbrau. Based on a phased in introduction of the new campaign, all television and radio commercials, as well as all outdoor advertising media, will cease utilization of the "strong character" reference by December 31, 1991.

In addition, no lithograph or point of sale referencing "strong character" will be shipped by Miller to any distributor after December 15, 1991.

As we mentioned, it was never the intention of Miller to use the word strong as any kind of direct or indirect reference to the alcohol content of Lowenbrau which, as you may well be aware, falls into the normal alcohol content range of a super premium beer. Rather, strong was used in conjunction with the word character; a word the average beer drinker utilizes in conjunction with an adjective to describe or compare beers. Evidence of our intent is

demonstrated by our use of the "BAUHAUS" style of art utilized to enhance Lowenbrau's German heritage and character.

Be that as it may, we understand the position being taken by the BATF in light of current attention being given to any possible reference to the alcoholic strength of a malt beverage product. In accordance with that understanding, Miller will follow the above schedule in the termination of the "strong character" campaign.

Very truly yours,

/s/ DANIEL P. DOCKERY

Daniel P. Dockery  
Associate General Counsel  
and Assistant Secretary

DPD/eat

\* \* \* \* \*

[Defendants' Exhibit AW, at p. 104]

# IT'S THE PROFIT!

One of the highest profit items on the shelf

More emphasis on taste—its smooth, mellow taste brewed for relatively high alcohol content (important to the Ethnic market!)

Strongly supported with powerful media advertising and point of sale in all major Ethnic markets



Prestige and value for the consumer  
Full-bodied, smooth, mellow, and the power of  
this 22 quart  
Z. Flint beer

## PROFIT PLANNER

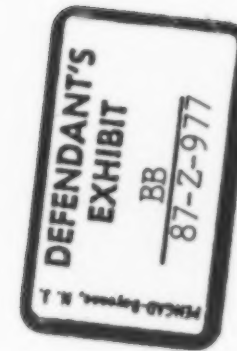
A. Cost:	\$ _____ per case	D. Est. Sales	\$ _____ per case
B. Price To Consumer:	\$ _____ per case	for period:	
C. Gross Margin:	\$ _____ per case	E. Total Gross Margin for period:	\$ _____ per case
	(B - A)		(C x D)
			00000010





PRODUCT	ALCOHOL CONTENT % BY VOLUME
Extra Gold	4.94
Budweiser	4.79
Miller Genuine Draft	4.68
Miller High Life	4.65
Stroh's	4.48

© 1990 Coors Brewing Company, Golden, Colorado 80401 • 8966



Waller Card

Front Size 2 1/8 x 3 1/2      Size 8566



**ST. IDES**  
PREMIUM MALT LIQUEUR

## ADVERTISING

The St. Ides Marketing plan will be spearheaded by a strong and memorable advertising program which will be seen and heard throughout the Bay Area, beginning June 29th.

### POWERFUL CREATIVE

- o The objective of the campaign will be to position St. Ides as the contemporary, premium quality malt, incomparably smooth in taste while unmatched in strength.
- o "Come to the eye of the Storm" will be the theme of the advertising, providing a distinctive and powerful image for the brand and a dramatic symbol of the product's potency.
- o The campaign will be executed in a pool of breakthrough radio spots with exciting musical themes and evocative "Eye of the Storm" imagery.
- o A series of striking outdoor posters and transit signs will also be employed to reinforce the radio campaign and firmly establish brand identification.

### BREAK THROUGH LEVELS

- o St. Ides advertising will run at aggressive levels throughout the year, and will include a heavy weight introductory period designed to generate immediate awareness and trial.
- o Spending in the Bay Area will be in excess of \$250,000 on an annual basis.
- o Levels will be competitive with the highest spending national malt liquor brands.
- o Goal to reach 100% of the target audience (Men 21-35) with an average frequency of 10 times in the first month.
- o Highlights of the plan are as follows:

### RADIO

- o 250 GRP's per week against target (Men 21-35)
- o Over 7000 cumulative GRP's over 12 months
- o Average of 15 sixty second spots daily, 75 spots weekly
- o Concentrated in key day parts: Wednesday through Sunday, 3:00 - 8:00 pm
- o Average 60% Reach with 5.0 Frequency on a weekly basis
- o Bay Area's top rated stations: KSOL, KDIA & KBLX

### OUTDOOR

- o 8 and 30 sheet postings throughout Bay Area
- o #75 showing in key target areas
- o Supplemental transit postings in Oakland and San Francisco
- o Average of 40 postings per month across the Bay Area
- o Average of 70 Reach with 2.0 Frequency per month
- o Quality positions keyed to target account locations

DEFENDANT'S  
EXHIBIT  
BT  
87-2-977

## [DEFENDANTS' EXHIBIT BZ, at p.2]

*Colt 45 Focus Groups  
New York, Philadelphia  
Key Observations*

*Malt Liquor*

- Consumers drink Malt Liquor to escape. They are very up front about admitting that “you drink malt to get high”
- Malt Liquor (particularly Colt 45) is a party drink, — Friday night having fun with the boys either at home or at the local bar.

*Brands*

- *Colt 45* is a terrific brand that with greater exposure will get stronger.
  - \*\*Malt Liquor of choice for the majority of focus group participates — Passionate response
  - \*\*Billy D has raised its status from the street corner to homes and bars
  - \*\*Participants believed it helps them have fun. “It gets me there quicker.”
  - \*\*Considered to have a kick but is smooth and lets you maintain some degree of control
  - \*\*Price is not an issue
- *Olde English*
  - \*\*Owns a clearly defined position as the strongest Malt Liquor — “I drink it when I want something to put me against the wall.”
- *Schlitz Malt Liquor*
  - \*\*Remembered for the bull
  - \*\*Considered smooth by some, tired and old by others
  - \*\*Appears vulnerable but we probably need to speak with consumers in a Schlitz core market to be sure

## [DEFENDANTS' EXHIBIT CA]

*HIGH ALCOHOL MALT LIQUOR  
POSITIONING STATEMENT*

To malt liquor drinkers, aged 21-34, who want to be viewed as the master of *any* situation, “Power Master” is the one malt liquor that combines the alcohol that they want with a smooth, clean taste that is never harsh when it goes down.

The reasons why are:

1. “Power Master” is the most powerful malt liquor.
2. “Power Master” is “Cool Brewed” to avoid the harsh taste that you get from so many other malt liquors.
3. “Power Master” is brewed by Colt 45 (if applicable) so you are assured that it is a high quality product.

The attitude surrounding this product and its advertising will be that of extreme power. The product delivers. The man who drinks Power Master is a leader who exerts significant control over those around him.

*ALTERNATIVE NAMES*

Night Star  
Colt 45 Extra



## [DEFENDANTS' EXHIBIT CD]

DELLA FEMINA MCNAMEE, INC.  
350 HUDSON STREET, NEW YORK, NY 10014  
212-886-4100. TELEX 428985. FAX 212-886-4415

MARY E. HALL  
SENIOR VICE PRESIDENT  
DIRECTOR OF RESEARCH

October 25, 1990

Mr. David G. Whalen  
Vice President, Business Development  
G. Heileman Brewing Co., Inc.  
10 South Wacker Drive, Suite 3200  
Chicago, IL 60606

Dear Dave,

This forwards Karen Montague's report on the High Alcohol one-on-ones. It differs from our conclusions to some degree by emphasizing the benefits of a Colt 45 position and neglecting the benefits of a more "macho" position. I believe this is because we ourselves have placed more importance on communicating the distinction of the high alcohol aspect of this brand as different from other malt liquor products. I continue to consider this a necessary task of the position and to think that we must identify the effect of the Colt 45 name.

Please call if you have any questions.

Best regards,

/s/ [illegible]

Mary Hall

cc: Bruce Carlisle

Hugh Nelson (G. Heileman)

David Harris (Lockhart & Pettus)

attachment

MEH:ccf

## [DEFENDANTS' EXHIBIT CD]

\* \* \* \* \*

# Malt Liquor Advertising Evaluation Among Black Consumers

## BACKGROUND

Colt 45 Malt Liquor, the flagship brand of G. Heileman, has been experiencing reduced volume. This situation is believed to be the result of competitive pressures in the form of aggressive pricing coupled with a number of new entries in the malt liquor category. In response G. Heileman is considering introducing a new malt liquor which in combination with Colt 45, will re-establish positive growth with the key user of malt liquor — Black males.

Della Femina, G. Heileman's advertising agency, is in the midst of developing advertising executions in support of this new brand entry. In so doing, the agency has clustered executional options around two distinct creative directions. These are:

- Executions whose central theme is that of a "line extension" to the base Colt 45 franchise. These executions use Colt 45 in the new product brand name and are predicated on positioning the new product as a "stronger/higher alcohol content" version of the parent brand.
- Executions whose central theme is the introduction of a new malt liquor which is "stronger/higher" in alcohol content than current brands on the market. These executions do not tie themselves to the Colt 45 base franchise and are positioned as "totally new" product entries.

Before a final decision on the creative direction for this new product can be made, Della Femina requires con-

sumer feedback from the target audience. This information is to provide input on the most impactful creative and copy direction of the new brand's advertising. With these goals in mind, this document represents the key findings from qualitative research conducted among Black male malt liquor drinkers.

\* \* \* \* \*

## SUMMARY OF FINDINGS

### General Usage

- Most respondents across all markets were Colt 45 favorite brand drinkers, with the next largest group being Schlitz Malt liquor drinkers.
- Regardless of the brand, "smooth taste with no after-taste" and a malt with "more of a kick than beer" were the main features respondents liked about their brand. In general, Colt 45 brand drinkers gave more importance to the alcohol effect.

### Reactions to Advertising Concepts

- Across all markets, the Colt 45 ads received the highest scores. The principal reasons were the concepts gave more information about the product than the other executions coupled with respondents' satisfaction and familiarity with the brand.
- Overall, seeing the Colt 45 name provided reassurance to many, even those who were not franchise drinkers, because it had been well-advertised and supported over the years.
- Of the ads that did not use the Colt 45 name, *Nightstar* showed the most promise as a viable concept and name for a new malt liquor. The success of *Nightstar* was due

primarily to the use of jazz which was associated with being "laid back", "coolin' out" and a "nightclub setting" all of which were perceived to go hand-in-hand with a malt liquor.

- With the exception of *Nightstar*, respondents seemed to prefer ads that spoke more about the product than those that talked about the image of the user. These included: Colt 45 Gold, Colt 45 Extra, and Colt Special Dry. Culprits of "too much" imagery were: *Ice Man*, *Apollo*, and *Power Master*.
- Brands which tended to communicate that the product had more alcohol and "more kick" on strictly a name basis were *Thunder*, *Wild Horse*, and *Power Master*. Interestingly, respondents viewed the product claim of "more alcohol" as appealing yet names which, on their face, suggested that it was a very potent malt were perceived to also force one out of control which was viewed as a negative.

\* \* \* \* \*

[Defendants' Exhibit CE, at p. 5]

DELLA FEMINA McNAMEE, INC.

### CREATIVE PLAN

CLIENT/BRAND: G. Heileman Brewing Co./Colt 45

ASSIGNMENT: \_\_\_\_\_

TODAY'S            INTERNAL            CLIENT  
DATE: \_\_\_\_\_ REVIEW: \_\_\_\_\_ PRESENTATION: \_\_\_\_\_

#### WHO IS THE TARGET?

Black males LDA to 34. They reside in urban areas, are very knowledgeable about the trends and "in" things happening in their environment. The respect of their peers is important to them. They primarily drink malt liquor for the quick hit the product provides. Colt 45 is also used in social occasions to help stimulate conversation and create a party atmosphere.

#### WHAT DO THEY BELIEVE NOW?

That Colt 45 is a smooth tasting malt liquor for people who like to have a good time. Colt 45 delivers the same kick as other malt liquors but has superior product image and taste which dignifies the user.

#### WHAT DO WE WANT THEM TO BELIEVE?

More of what they currently believe but the advertising must increase the perception that Colt 45 is *the* premium malt liquor for today's young Black men. Colt 45 should be presented as the class act of malt liquors.

#### WHAT DO WE SAY TO CONVINCE THEM?

- Nothing is smoother than Colt 45
- The right people drink Colt 45 in the hippest situations
- Imply that Colt 45 has the desired kick

#### WHAT SUPPORTS OUR CLAIM?

The claims are generic to malt liquors and our consumers are very knowledgeable about the segment. What's important is how the commercial execution supports the premium, contemporary image of Colt 45.

\* \* \* \* \*



[Defendants' Exhibit CII]

COLT 45 MALT LIQUOR  
RESEARCH REVIEW  
1983-1989

Prepared for: G. Heileman Brewing Co.  
Prepared by: W.B. Doner & Company  
Date: February 27, 1990

\* \* \* \* \*

BRAND PERCEPTIONS/IMAGERY

I. *PERCEPTIONS ABOUT MALT LIQUOR*

Category users claim that the primary defining characteristic of the malt liquor category is perceived alcohol content or strength of the alcoholic effect.

- What differentiates malt liquors for most drinkers is the perceived alcoholic potency.
  - Malt liquor drinkers neither know nor care about differentiating malt liquors on the basis of ingredients or brewing process.
  - Most people group malt liquor brands together and distinguish them from most brands of beer.

(C)

\* \* \* \* \*

Malt liquor drinkers select malt liquor rather than beer when intoxication is desired, appropriate or acceptable.

- For many, that means malt liquor is drunk more often at home, where "loss of control" is acceptable.

- Malt liquor is drunk with particular sets of friends among whom drinking is one of the attractions for getting together.
- Ordering or drinking malt liquor signals to others the intent to "party" or get high.

\* \* \* \* \*

[Defendants' Exhibit CL]

## QUALITATIVE RESEARCH

conducted for

G. HEILEMAN BREWING CO., INC.

conducted by

NATIONAL ANALYSTS  
A Division of Booz-Allen & Hamilton, Inc.

JANUARY 1988

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## THE MOST COMMON IMAGERY FOR *OLD ENGLISH* INVOLVES ALCOHOL POTENCY, BUT "ENGLISH" IMAGES ARE ALSO PRESENT

- Old English is widely believed to be the most potent of the popular malt liquors.
  - Many malt liquor drinkers respond positively to the idea of superior potency.
    - They like efficiency in "getting a buzz."
    - They like getting their money's worth in alcohol.
    - They enjoy associating themselves with the imagery of wildness and partying that alcohol potency suggests.
  - However, when potency image leads to associations with drunks and hard-drinking "kids," it can become negative for many malt liquor drinkers.
- "English" imagery sometimes emerges for the brand and sometimes coexists with the associations involving potency and unrestrained drinking.
  - Somewhat paradoxically, some of the English imagery is elegant or refined.
  - Sometimes the potency and English images merge or achieve some consistency:
    - With the perception that English beer is strong and potent
    - With such English images of power as knights or Henry VIII.

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- In summary:
  - The commercials have powerful assets:
    - Move Colt 45 upscale and away from street corner associations
    - Invite and legitimize use by women
    - Evoke sexual motivations that can be interesting and appealing
  - The commercials also raise some problems:
    - Do not speak forcefully to the dominant category motivation: potency and usually a degree of uninhibited self-indulgence and escape
    - Use staging that sometimes strains their credibility as being about malt liquor
    - Appeal too blatantly to sexual motivation for some more sophisticated malt liquor drinkers

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[Defendants' Exhibit DA]

*Modern Brewery Age Blue Book*

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[272]      **PERMISSIBLE ALCOHOLIC CONTENT  
FOR FERMENTED MALT BEVERAGES**

**ALABAMA** – Minimum 0.5% by volume. Maximum 4% by weight and 5% by volume.

**ALASKA** – Minimum 1% by volume.

**ARIZONA** – Minimum 0.5% by volume.

**ARKANSAS** – Maximum 5% by weight; (over 5%; higher licenses, lower tax).

**CALIFORNIA** – Minimum 0.5% by volume. Maximum 4% by weight for beer. Ale, etc., no maximum.

**COLORADO** – Minimum 0.5% weight; over 3.2% (malt liquor), higher licenses.

**CONNECTICUT** – Minimum 0.5% by volume.

**DELAWARE** – Minimum 0.5% by volume.

**DISTRICT OF COLUMBIA** – Minimum 0.5% by volume.

**FLORIDA** – All beer containing more than 6.243% of alcohol by volume (formerly, more than 5% by weight) will be considered "intoxicating liquors."

**GEORGIA** – Maximum 6% by volume.

**HAWAII** – Minimum 0.5% by volume.

**IDAHO** – Maximum 6% by weight; beer containing more than 4% alcohol by weight shall be considered and taxed as wine.



**ILLINOIS**—Local option may limit to 4% by weight. Minimum 0.5% by volume.

**INDIANA**—No limit.

**IOWA**—Minimum 0.5% by volume. Maximum 5% by weight; higher alcoholic content beer through state stores.

**KANSAS**—Maximum 3.2% by weight. Over 3.2% in liquor stores, in packages only.

**KENTUCKY**—Local option may limit to 3.2% by weight. Minimum 0.1% by volume.

**LOUISIANA**—Maximum 6% by volume; higher alcoholic content beer through liquor licensees. Dry areas 3.2% by weight.

**MAINE**—Minimum 0.5% by volume.

**MARYLAND**—Minimum 0.5% by volume.

**MASSACHUSETTS**—Maximum 12% by weight. Minimum 0.5% by volume.

**MICHIGAN**—Minimum 0.5% by volume.

**MINNESOTA**—0.2% by weight, over 3.2% higher licenses and tax; minimum 0.5% by volume.

**MISSISSIPPI**—Maximum 4% by weight.

**MISSOURI**—Maximum 3.2% by weight. "Malt liquor" (over 3.2%), 5% by weight, minimum 0.5% by volume.

**MONTANA**—Maximum 7% by weight, minimum 0.5% by volume.

**NEBRASKA**—No limit.

**NEVADA**—Minimum 0.5% by volume.

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**NEW HAMPSHIRE**—"Beverage" and "cider": not less than 0.5% alcohol by volume—previously was 1% or more by volume minimum.

**NEW JERSEY**—Minimum 0.5% by volume.

**NEW MEXICO**—Minimum 0.5% by volume.

**NEW YORK**—Minimum 0.5% by volume.

**NORTH CAROLINA**—Maximum 6% by weight; minimum 0.5% by volume.

**NORTH DAKOTA**—Minimum 0.5% by volume.

**OHIO**—Maximum 6% weight; minimum 0.5% by weight.

**OKLAHOMA**—Maximum 3.2% by weight; over 3.2% in liquor stores, packages only. Minimum 0.5% by volume.

**OREGON**—Maximum 4% by weight for beer; 14% by volume for malt beverage other than beer. Minimum 0.5% by volume.

**PENNSYLVANIA**—Minimum 0.5% by weight.

**RHODE ISLAND**—Minimum 0.5% by volume.

**SOUTH CAROLINA**—Maximum 0.5% by weight.

**SOUTH DAKOTA**—Minimum 5% by weight. Maximum "low point beer" 3.2% weight; high point, 6% weight.

**TENNESSEE**—Maximum 5% by weight; over 5% higher licenses and tax.

**TEXAS**—Beer 4% by weight; "ale" or "malt liquor" over 4%, higher licenses and tax. Minimum 0.5% by volume.

**UTAH**—Maximum 3.2% by weight. Over 3.2 in state stores. Minimum 0.5% by volume.

**VERMONT**—Maximum 6% by volume. Higher alcoholic content beer through state stores. Minimum 1% by volume.

**VIRGINIA**—Minimum 0.5% by volume.

**WASHINGTON**—Maximum 8% by weight; higher alcoholic content through state stores. Minimum .5% by volume.

**WEST VIRGINIA**—Maximum 4.2% by weight; 6% by volume.

**WISCONSIN**—Maximum 5% by weight; (over 5%, higher licenses, same tax). Minimum .5% by volume.

**WYOMING**—Minimum .5% by volume.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

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Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
THE UNITED STATES DEPARTMENT OF THE TREASURY, AND  
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
DEFENDANTS

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[Filed Oct. 29, 1992]

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**DECLARATORY JUDGMENT AND INJUNCTION**

This matter was tried on October 26, 1992, through October 28, 1992, before the Honorable Zita L. Weinshienk, Judge, presiding. After hearing the evidence and arguments, the Court made oral findings of fact and conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that the Court declares, adjudges and decrees that the specific part of 27 U.S.C. § 205(e)(2), prohibiting statements of the alcoholic content in the labeling of malt beverages is an unconstitutional restraint on commercial speech in violation of the First Amendment of the Constitution of the United States. It is

FURTHER ORDERED that the Bureau of Alcohol, Tobacco and Firearms shall not enforce said statutory prohibition commencing November 9, 1992. It is

FURTHER ORDERED that defendants shall have a stay of execution until November 9, 1992.

DATED at Denver, Colorado, this 29th day of October, 1992.

BY THE COURT:

/s/ Zita L. Weinshienk

ZITA L. WEINSHIENK, Judge  
United States District Court

## Supreme Court of the United States

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No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY, PETITIONER

v.

ADOLPH COORS COMPANY

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ORDER ALLOWING CERTIORARI. Filed June 13, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

June 13, 1994